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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF OCTOBER 4, TO AND INCLUDING DECISIONS OF NOVEMBER 29, 1892.

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS, 90
STATE REPORTER.

VOLUME CXXXV.

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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING OCTOBER 4, 1892.

135 1
136 505

CHARLES G. GABRIELSON, Respondent, *v.* FREDERICK WAY-
DELL et al., Appellants.

The owners of a vessel are not liable in damages for the willful and malicious acts of its master in assaulting and injuring a seaman while upon the high seas; such an act being of a criminal nature, is not in violation of any duty imposed upon the owners by maritime law, and the doctrine of *respondet superior* has no application. (MAYNARD, FINCH and O'BRIEN, JJ., dissenting.)

Scarff v. Metcalf (107 N. Y. 211); *Hunt v. Colburn*, *Luscom v. Osgood* (1 Sprague, 215, 82); *Sherwood v. Hall* (3 Sumner, 127), distinguished.

The master and seamen of a vessel are engaged in a common employment and are fellow-servants, although of different grades, and while the master in rendering to the seaman that care and in performing those duties imposed upon its owners by the maritime law represents them, and for a neglect of duty in these respects they are liable, in all matters outside the scope of the master's employment and without the authority committed to him by maritime law, his misconduct is a risk assumed by the seaman, for the consequences of which the owners are not responsible.

C., etc., R. R. Co. v. Ross (112 U. S. 377), disapproved.

(Argued April 20, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made October 16, 1891, which affirmed an order denying a motion

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for a new trial, overruled defendants' exceptions ordered to be heard in the first instance at General Term, and directed judgment upon a verdict in favor of plaintiff.

This action was brought to recover damages against the owners and captain of a vessel upon which plaintiff had shipped as an able seaman, and while in such service, had received grave injuries.

During a voyage from the West Indies to the United States, upon a certain occasion, being ordered by the mate to "turn to," he said he was sick and not able to go on deck. He had previously suffered from chills and fever, and what he was then suffering from seemed to be an attack of a similar nature. The captain came into the forecabin and ordered him to go on deck. Plaintiff told him he was sick. The captain then hit him several times, while lying in his bunk; pulled him out of his bunk and said, "will you go on deck now?" Plaintiff said, "I feel sick; I am not able to go on deck." The captain again hit him several times with his fist, and upon plaintiff's catching hold of his arm, then kicked him upon the leg, breaking the bone below the knee. There was no struggle between the men, nor any provocation for the captain's treatment beyond plaintiff's complaint of illness. He was placed back in his bunk and his leg rudely placed in splints. Upon the arrival of the vessel at New York he was taken to the hospital and remained there until discharged as cured. The captain was not served with the summons and complaint, as he had never returned from a subsequent voyage and was supposed to have been lost. The trial judge denied a motion for a nonsuit and permitted the case to go to the jury, and plaintiff recovered a verdict.

N. B. Horie for appellant. The owners of a vessel are not liable for the willful and malicious acts of its captain. (*Scarff v. Metcalf*, 107 N. Y. 216.) At common law the claim of the plaintiff is without foundation. (*Hoffnagh v. N. Y. C. & H. R. R. Co.*, 55 N. Y. 610; *Cahill v. Hilton*, 106 id. 512; Story on Agency, § 456; *Wright v. Wilcox*.

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19 Wend. 343; *Lyon v. Martin*, 2 Ad. & El. 512; *Fraen v. Freeman*, 43 N. Y. 569; *Vanderbilt v. R. T. Co.*, 2 id. 479.) The plaintiff and the captain were fellow-servants of the owners of the vessel, engaged in the same general business or employment, *i. e.*, the navigation of the vessel, and as the injury the plaintiff complains of resulted from the misconduct of a fellow-servant the owners are not liable to respond therefor. (*Crispin v. Babbitt*, 81 N. Y. 516; *McCosker v. L. I. R. R. Co.*, 84 id. 77; Wood on Mast. & Serv. § 438; *Loughlin v. State*, 104 N. Y. 159; *Scarff v. Metcalf*, 107 id. 211; *Farwell v. B. & W. R. R. Co.*, 4 Metc. 49; *Bolt v. N. Y. C. R. R. Co.*, 18 N. Y. 43; *Wright v. N. Y. C. R. R. Co.*, 25 id. 562; *Filbert v. D. & H. C. Co.*, 121 id. 212; *Hussey v. Cogger*, 112 id. 614; *Brick v. R. R. R. Co.*, 98 id. 211.) The master of a vessel is the *alter ego* or representative of the owners only in the performance of the duty which such owners owe to a sailor and which is by them devolved upon the master. (*Crispin v. Babbitt*, 81 N. Y. 516; *Johnson v. B. T. Co.*, 135 Mass. 209; *Matthews v. Case*, 61 Wis. 491.) If the liability of a principal to a stranger can be invoked in favor of the plaintiff in this case, the facts do not warrant a recovery. (*Rounds v. D. & L. R. R. Co.*, 64 N. Y. 129; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 id. 624; *Kelly v. Doody*, Id. 580.) As by the submission of the question to the jury and their verdict, the assault has been determined to have been within the scope of the captain's duty, such assault was clearly one of the risks of plaintiff's employment which he assumed. (*Gurney v. G. T. R. R. Co.*, 59 Hun, 625; *Gibson v. E. R. Co.*, 63 N. Y. 452.) The judgment should be reversed, and as it is clear that the issue cannot be decided in more than one way upon another trial, that the respondent cannot prevail in the suit, final judgment should be rendered in favor of the appellants. (*Ehrichs v. DeMill*, 75 N. Y. 374; *Foot v. Æ. L. Ins. Co.*, 61 id. 578.)

George P. Gordel for respondent. The owner of a vessel is liable for the willful act of the master performed within the

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scope of his duty and to further the interests of the owner. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Cohen v. R. R. Co.*, 69 id. 170; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 id. 117; *Stewart v. B. & C. R. R. Co.*, 90 id. 588; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 id. 25; *Mott v. C. I. Co.*, 73 id. 543; *Thompson v. Hernan*, 47 Wis. 602; *Sherwood v. Hall*, 3 Sumn. 127; *Cromber v. Oakman*, 3 Allen, 185; *Scarff v. Metcalf*, 107 N. Y. 482.) The master of a vessel on the high seas, when inflicting punishment on a seaman or enforcing discipline, is not the fellow-servant of the seaman. (*Chamberlain v. Chandler*, 3 Mason, 242; *Waterbury v. Myrick*, B. & H. 34; *The Centurian*, 1 Ware, 477; U. S. R. S. § 4596, subd. 455; *Jordan v. Williams*, 1 Curt. 69; *R. Co. v. Herbert*, 116 U. S. 642; *Daub v. N. etc., Co.*, 18 Fed. Rep. 625; *The Titan*, 23 id. 413; *Garratry v. K. etc., Co.*, 25 id. 258; *Walcott v. Studebaker*, 34 id. 8; *Van Avery v. Union etc., Co.*, 35 id. 40; *The A. Heaton*, 43 id. 593; *The City of New York*, 25 id. 150; *Baker v. Corey*, 19 Pick. 496; *Luscomb v. Osgood*, 1 Sprague, 82; *Pickering v. Holt*, 6 Me. 160; *Crispin v. Babbitt*, 81 N. Y. 516; S. & R. on Neg. § 230; *Flike v. B. & R. R. Co.*, 53 N. Y. 554.) The charge of the judge as a whole having conveyed the correct rule of law, no specific exception to it will be sustained. (*Caldwell v. N. J. S. Co.*, 47 N. Y. 282.)

GRAY, J. The question, brought up by this record, is whether the owners of a vessel can be made liable in damages for the willful and malicious act of their captain in assaulting and injuring a seaman while upon the high seas. The learned trial judge, in denying the motion to dismiss the complaint, proceeded upon two grounds: namely, that the captain was the representative, or *alter ego*, of the owner and was not a fellow-servant with the plaintiff; and that the willful and malicious nature of the captain's act constituted no ground for an exception to the liability of the owners, if the act was performed within the general scope or course of his employment. Therefore, he left it to the jury to decide whether, in what

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he did to the plaintiff, the captain was acting in the line of his duty.

I think this appeal should prevail. There was no conflict in the evidence and it proved a willful assault by the captain of the vessel upon one of the seamen; which nothing in the evidence, or within any principle of the maritime law, justified as coming within a proper, or an intended, exercise of authority. For its occurrence the owners cannot be held responsible, in my opinion, either upon sound reasoning, or upon any sufficient precedent; and the trial judge should have dismissed the complaint. I concede, fully, that we should, in determining this question, be guided by the principles of the maritime law. The plaintiff's employment was, of course, a maritime contract. It is matter of familiar knowledge that about the mariner, the maritime law throws a protection greater than is extended by the general rules of the common law to him who is employed in a service upon the land. This distinction arises, very naturally, from the difference in the nature of a mariner's life and employment; which subject him to hazards and hardships and tend to make him heedless in character. So the maritime law is peculiarly solicitous of his rights and watches over his more unprotected condition. Thus, for instance, it is strict in requiring shipping articles and liberal in interpreting them for the seaman's interests, in the presence of unfair, or inadequate provisions. It obliges the owners to provide a seaworthy vessel; it requires that the vessel shall be provided with proper appliances for the seaman's safety and with adequate and proper food for his sustenance; and it imposes the duty of providing for his medical care and attendance in case of sickness or wounds. From the seaman a faithful and strict performance of his duties is required, and, because of the responsibility devolving upon the master of the vessel for the successful conduct of the voyage, considerable latitude in disciplinary powers is allowed to him; though no cruel or excessive punishment is sanctioned. In rendering to the seaman that care and in performing those duties toward him which

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the law exacts from the owners of the vessel, the captain for such purposes represents them and a neglect of his, in such respects, is visited upon the owners. This liability follows from the situation of the parties. The owners are not in charge of the vessel. They remain upon the land and employ a master for the vessel; as well to carry out their assumed, or implied, obligations to the members of the ship's company, as to perform the undertaking of conducting the craft successfully upon its voyage. The delegation of powers to the master of the vessel comprehends their exercise in all such ways as the safety of the vessel and the welfare of its company render needful, or expedient. While in those respects, which demand of the owners the rendition of certain duties towards the crew, the master of the vessel must and does represent them and, by his failure or neglect, will entail consequences upon them for the breach of the obligation, he is, notwithstanding his representative and superior position, but a servant; employed with the others of the ship's company upon the vessel in the service of its owners. The scope of the service varies, as the position of the individuals employed differs; but, relatively to the general undertaking, they are fellow-servants engaged in one common employment.

In *Scarff v. Metcalf* (107 N. Y. 211), which was an action by a mate against the owners of a vessel to recover damages for negligence in omitting to provide him with adequate medical attendance and care, the plaintiff's recovery was sustained in this court upon the ground that there had been a neglect of a duty imposed by the maritime law. Such a duty has always been recognized and was prescribed in the laws of Oleron and Wisbuy. What that case decided, with respect to the liability of the owners of a vessel to a seaman for a neglect of the captain, was that it existed whenever his neglect concerned something as to which a duty rested upon the owners under the principles of the maritime law; which, by force of the situation, could only be discharged through the agency of the vessel's master. Its effect is to hold that in matters relating to the owners' duty to the seaman, which the

captain must perform, his neglect could not be regarded as merely that of a fellow-servant, but as the neglect of the owners.

Cases which relate to the rights of passengers, or third persons, I do not consider as precedents, and several of that nature have been referred to. In the one class of cases the passenger's contract for transportation entitles him to protection against the negligence or assaults of the employees of the carrier. In the other class strangers have the right to hold the owners liable for the consequences of a willful act of the captain performed while engaged in the prosecution or execution of the owners' business. The cases of *Hunt v. Colburn* and *Luscom v. Osgood* (1 Sprague, pp. 215 and 82) related, as to the first, to the wrongful dismissal of an officer; and, as to the second, to the right to compensation for a minor's services; and I cannot see in them precedents for the decision of this case. Nor is the case of *Sherwood v. Hall* (3 Sumner, 127) an authority. That was an action for the shipment by the master of a vessel of the minor son of the libellant, and he recovered a certain amount of wages and something for expenses and losses. The master there was the agent of the owners in shipping seamen to be employed on their vessel.

The responsibility for the wrongdoings of the master of a vessel rests to a certain extent only upon the owners, and that extent is reached when the performance of the act complained of cannot be seen properly to come within some principle of the law of agency. The agency of the captain for the owners would include all those acts which are fairly embraced within the scope of his appointment, and which would be in the line of his duty; but when he injures his men by misconduct or assault, that would seem to be as much one of the risks which they assumed in entering the employment upon the vessel, as it would be one in the case of an employment in a concern upon the land where the control and superintendence had been committed by the proprietor to a manager. It is impossible to regard a wanton assault upon a seaman by his captain

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as something within any intended authority, or within the scope of his employment. He outruns his authority and commits an act which the owners will not be presumed to have assented to. I believe that by no extension of the principles of the law of master and servant, the general source of the law of principal and agent, could the blame be imputed to the owners of the vessel. It should at least appear that the act of the captain was required by the pressing emergencies of the occasion, and not that he had indulged his passions by a vindictive treatment of the seaman.

In the cases of *Dias v. The Privateer Revenge* (3 Wash. C. C. 262) and of *Ralston v. The State Rights* (Crabbe, 22), the distinction is recognized between the acts of a master of a vessel done while engaged in the course of his duty in the prosecution of the owners' business and those wholly outside of the scope of his employment. In the one case, the illustration was of a piratical seizure, and in the other, it was of the commission of a crime by the captain; neither of which acts can be imputed to his owners, or be intended to come within the employment or authority committed to him. In *Wilson v. Rankin* (6 Best & Smith, 208), which was an action to recover insurance moneys, the question turned upon whether the authority of the master of a vessel was of such a general nature as to subject the owners to the consequences of his having stowed the cargo in violation of the statute. Judgment was rendered for plaintiff, and COCKBURN, C. J., in delivering the opinion of the court, used language quite applicable here. He said that "it is a well-established distinction that, while a man is civilly responsible for the acts of his agent, when acting within the established limits of his authority, he will not be criminally responsible for such acts, unless express authority be shown, or the authority is necessarily to be implied from the nature of the employment, as in the case of a bookseller held liable for the sale by his shopman of a libellous publication. Under ordinary circumstances, the authority of the agent is limited to that which is lawful. If, in seeking to carry out the purpose of his employment, he

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oversteps the law, he outruns his authority and his principal will not be bound by what he does." And again he said that "no authority can be implied in the master, in the discharge of his duty, to do that which, with reference to this part of his duty, was a violation of the law."

What was the act here complained of, if not a willful and unjustifiable assault? It was not disciplinary, for the idea of discipline does not suggest a personal attack with blows and kicks; and incompetency, or inability, does not justify punishment. (*Payne v. Allen*, 1 Sprague, 304.) It was certainly within the category of those offenses for which the United States Statutes have prescribed the punishment of fine or imprisonment. (U. S. Rev. Stat. § 5347.) It was of a criminal nature, and, hence, not intended by the law to be within the scope of the employment of the captain, nor within the authority committed to him.

Conceding all that we should to the force of the established principles of maritime law in determining the question of liability here, we cannot say that the general rule at common law is interfered with in its application to the case; or that those principles of the maritime law establish any different rule. There is no question but that the powers of a captain of a vessel are very extensive by virtue of his peculiar position. His great responsibilities and the general interests of commerce invest him with much discretionary power. His is the agency to which the law looks for the fulfillment of the obligations resting upon the vessel's owners; and for his shortcomings and wrongdoings, when occurring in the performance of his duty or in the scope of his employment, those owners must be liable. The more extensive powers and wider control exercised by the captain enlarge the field of service and necessarily heighten the responsibility of the owners to passengers, servants, or strangers; but, after all that can be said, where is the warrant for holding them liable for the consequences of acts which are in utter departure from the execution of a duty? He has absolute command over the seamen in matters pertaining to their duties; but his command does

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not extend over their persons beyond the infliction of usual and necessary punishment in cases of disobedience or infraction of rules.

We are then brought to the consideration of the rule of liability which would be applied to this case under the law as settled by this court, and there we will find the rule is not *respondeat superior*. We find that for an injury, resulting to an employee from the willful neglect, or tortious act of another, who is engaged in a common employment with him, the master is not liable at the suit of the injured employee. He has performed his duty when he has furnished to those who are employed by him a reasonably safe place, appliances adequate to the purposes of the employment, and when he has appointed as fellow-servants in the undertaking proper persons, competent for their positions. After that, for what may happen from the risks of the employment, or from the negligence and torts of fellow-servants, he will not be responsible. In the early case in this court of *Keegan v. W. R. R. Co.* (8 N. Y. 175), RUGGLES, Ch. J., stated the general rule thus: "Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other. But where the injury results from the actual fault of a competent and careful agent (as may sometimes happen) the fault will not be imputed to the principal when the injury falls upon another servant as it will where the injury falls on a third person, as for instance on a passenger on a railroad. In the case of a passenger the actual fault of the agent is imputed to the principal on grounds of public policy; in the case of a servant it is not."

There is no evidence in this case that the owners failed in a compliance with any obligation to their employees in the ship's company, in the selection of a proper and competent captain; and were they to be accountable for his loss of temper or misconduct toward the other employees? I think not.

The proposition that the master of a vessel is not a fellow-servant of the seaman is predicated upon the difference in

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their grades, and it has received the support of a decision in the United States Supreme Court, in the case of *Chicago, etc., R. R. Co. v. Ross* (112 U. S. 377), upon which case subsequent decisions in the federal courts have been based, which are referred to in the respondent's brief. The opinions in the cases of "*The Titan*" (23 Fed. Rep. 413); "*The Schem*" (42 id. 66); and of "*The A. Heaton*" (43 id. 593), which are referred to by the respondent, were expressly rested upon the *Ross* case.

Spencer v. Kelley (32 Fed. Rep. 838), which seems to give some support to the respondent's contention, was at *nisi prius*. The trial judge's remarks in his charge, if susceptible of the meaning attached to them, have no support, unless in the *Ross* case. He certainly refers to no authority. The *Ross* case was decided by a mere majority of the justices and is of questionable authority. It is without weight in this state, and has been distinctly disapproved in *Loughlin v. State* (105 N. Y. 159). Judge ANDREWS, speaking there of the responsibility of employers for injuries sustained by servants from the negligence of co-servants, remarked: "In harmony with the general principle that the character of the act is the decisive test, it has been repeatedly decided in this court that the fact that the person whose negligence caused the injury was a servant of a higher grade than the servant injured, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule, nor make the master liable."

The learned judge, referring to the citation of the *Ross* case, said it was "in conflict with the course of decisions in this state and elsewhere." That case and many prior decisions of this court, to some of which Judge ANDREWS refers, have settled the rule that the liability of the master for a servant's injury, received while in his employment from the act of another servant, does not depend upon the grade or rank of the offending or negligent servant. The liability of the master to his servant in such cases does not depend upon the

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doctrine of *respondeat superior*. That doctrine has no application and if a servant, under guise of exercising the authority conferred upon him, willfully and maliciously does an injury to another servant, the servant's master is not liable. As to such a matter the relation of master and servant affords no ground for an action. (*Sherman v. Rochester, etc., R. R. Co.*, 17 N. Y. 153; *Hofnagle v. R. R. Co.*, 55 id. 610; *Malone v. Hathaway*, 64 id. 5; *Crispin v. Babbitt*, 81 id. 516; *Loughlin v. State, supra*.)

In every case, it is the character of the act which causes the injury to a fellow-servant that determines the question of the master's liability, and the dividing line may be found in the willfulness, or in the neglect, which caused it.

It was said in *Wright v. Wilcox* (19 Wend. 343) that the master is not accountable for every mischievous act of the servant, which he is enabled to commit in consequence of the general relation; and LORD KENYON remarked in *McManus v. Crickett* (1 East. 106): "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him."

The law may be regarded as settled in the English courts, for a number of years, that the master is not liable to a servant for an injury occasioned by the negligence of a fellow-servant, although he be a vice-principal or the manager of the concern. (*Priestley v. Fowler*, 3 M. & W. 1; *Wilson v. Merry*, L. R. 1 H. of L. Sc. 326; *Howells v. Lansdore Steel Co.*, L. R. 10 Q. B. 62.)

There is a very recent case, quite in point, decided by the English Court of Appeal. ■ *Hedley v. Pinkney & Sons Steamship Co.* (L. R. Q. B. Jan. 1892, 58), that court decided, reversing a judgment recovered below, that ship-owners were not liable in damages for the death of one of the crew of a steamship, occurring by reason of the captain's negligence, in a matter pertaining to the care of the ship. It was there held that the captain and men were fellow-servants, engaged in a common employment, and for the injury result-

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ing to the one from the negligence of the other their master was not liable. Reference was made in the opinions to the case of *Ramsay v. Quinn* (Ir. Rep. 8 C. P. 322), where a contrary view was taken by the Irish Court of Common Pleas as to the liability of the shipowners and as to the relations of the captain and seamen, and the Court of Appeal refused to accept or to agree with that decision as authority. KAY, L. J., in his opinion in the case, said, in referring to *Wilson v. Merry* (*supra*), which was a case where a miner was killed through an explosion caused by the negligence of a manager of the mine: "I see no difference between that case and the case of a captain of a ship and one of the crew."

I think there is no reason for applying any different rule of law in this case than that recognized in our own and in the English courts. However great may be the powers of a captain of a vessel, and however absolute his control, these considerations do not furnish a reason for holding his owners responsible for his malicious conduct towards the other seamen. They are all working together in the same undertaking and are in a common service, and his misconduct is one of the risks the seaman assumes. I am not satisfied that there is any principle of the law which intends, or that any consideration of public policy demands, that the owners shall come under any obligation to indemnify a member of the ship's company against such negligent or tortious acts of the captain.

I deem it, too, somewhat significant that no case is referred to in the Admiralty or United States Circuit Court reports prior to the decision in the *Ross* case (*supra*), where the owners of a vessel have been sued for the captain's tortious acts, and my own examination has revealed none; though I find many cases where the captain has been sued for damages. For instance, in *Thomas v. Lane* (2 Sumner C. C. decided in 1834) the captain was sued and held as jointly liable with a mate for the mate's tort. In *Forbes v. Parsons* (Crabbe, 283, decided 1839); in *Fuller v. Colby* (3 Woodb. & Minot, 1, decided in 1846); in *Jordan v. Williams* (1 Curtis C. C.

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Dissenting opinion, per MAYNARD, J.

69, decided in 1851), and in *Payne v. Allen* (1 Sprague, 304, decided in 1855), the libels were against the captain for personal wrongs from his acts of violence and ill-usage. I am quite unable to perceive any reason for holding the owners of this vessel responsible for the mere passionate and vindictive act of their captain. The complaint should have been dismissed by the trial judge on the motion of their counsel.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to abide the event.

MAYNARD, J. (dissenting). Under the maritime law, the master of the ship has plenary powers as the agent and representative of the owners. He selects, hires and discharges the seamen at his pleasure. He has supreme control of the management and navigation of the vessel, with which even the owners themselves, if present, cannot interfere. He determines all matters relating to the discipline of the crew, and the kind of punishment to be inflicted for disobedience of orders, or for a breach of maritime regulations, and when and by what instrumentality it shall be administered. While on ship-board his word is law, and he is, in fact as well as in name, the "master" of the vessel. He may, when necessary, purchase supplies upon the credit of the ship, and in certain emergencies hypothecate and even sell it without the knowledge or express assent of the owners.

Having clothed the master with such extraordinary powers, it is not surprising to find that, in discussing the extent of the owner's liability for his acts, the writers upon maritime law have asserted that the master is bound to the owners, and he and they to everyone who may be affected by his acts, for his skill and attention in the management of the ship. It is not sufficient that he exercises his best judgment. He is bound to show that he possessed and exercised the judgment of a good commander, with reasonable skill, care, prudence and fidelity. (Curtiss, p. 195.) By the general maritime law of continental Europe, the responsibility of the owners for the master's obligations, *ex delicto*, might be limited to their inter-

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Dissenting opinion, per MAYNARD, J.

est in the vessel and freight, if they so elected; but neither the civil law nor the common law of England recognized any such limitation, and it has, therefore, been said that the owners are personally liable for all the obligations which the master incurs, within the scope of his authority as master, to their full extent, whether arising *ex contractu* or *ex delicto*. (Id. pp. 198, 199; Parsons on Maritime Law, 94, 391.)

In one case, the Admiralty Court held that the owners were answerable for torts committed by the captains they employed, under a general principle of the maritime law, and not by virtue of any special contract. (*Dean v. Angus*, Bee. 375.)

While all these authorities assert the liability of the owners in terms so general and so broad as to include the tortious acts of the master towards the members of the crew, yet it is evident that attention was not specially directed to this class of cases, and we do not, therefore, feel at liberty to hold that any different rule is to be adopted in ascertaining and measuring that liability than has been applied by this court where the servant has sought to render his employer responsible for injuries received in other than maritime employments. The ship-master and the crew were all engaged in a common undertaking, and unless the acts of which the plaintiff complains were in some form a violation of the obligations which the defendants assumed as a part of the contract of hiring, or of some positive duty imposed upon them by law, he cannot be permitted to maintain this action. (*Crispin v. Babbitt*, 81 N. Y. 516; *Loughlin v. State*, 105 id. 159.) There is, however, an exception to this rule, which is noted by Wood in his treatise on Master and Servant, at page 864 (§ 438): "If he (the master) places a servant in a position of authority over other servants, and makes the inferior servants subject to the direction and control of the superior, while he is not chargeable for the consequences of directions given by such superior servant within the scope of the general employment, yet there is no reason why he should not be chargeable to a co-servant for an abuse of such authority as much as he would be to a stranger." The gravamen of the plaintiff's cause of action is

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that he was cruelly and unnecessarily beaten by the ship-master for an excusable refusal to obey his orders, and it may, therefore, well be questioned whether the case is not brought within the exception here referred to.

But we think the liability of the defendants in this case rests upon a much broader ground. If the plaintiff's testimony is worthy of belief, his injuries were the direct result of their failure to observe their contract obligations and duties towards him.

The mariner's contract of hire is *sui generis*. It differs in many essential respects from the ordinary contract for service upon land. When once undertaken by a seaman he cannot withdraw from it at his pleasure. If he leaves the service without good cause he may be branded as a deserter and a criminal, and may be arrested by his employers without process or warrant and forcibly compelled to return to the vessel and complete his engagement for service. He may be put in irons or confined in jail in a foreign country, or instantly subjected to corporal punishment, if, in the judgment of his employers, he is remiss in his duty or disobedient to his superiors, or guilty of any conduct subversive of the good order or discipline of the ship.

As stated by an eminent American writer upon the subject: "It is the only form of service stipulated to be rendered by a freeman of full age, known to the common law, in which the employer by his own act can directly inflict a punishment on the employed, for neglect of duty or breach of obligation." (Curtiss, p. 12.) These manifestly harsh and oppressive features of the service, as well as other hardships and exigencies frequently encountered in it, gave rise to the imposition of correlative duties and obligations upon the part of the ship-owners. We, therefore, find that some of the most important stipulations in the seaman's contract for hire are not usually contained in the shipping articles at all, but are dependent upon the principles of the maritime law.

They are none the less obligatory upon the parties than if they had been inserted in the written compact between them.

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One of these guarantees upon the part of the owners, which is of supreme moment to the mariner, on account of his defenseless and perilous position upon the high seas, is that he shall have good treatment and be protected from unnecessary violence. Special emphasis is placed upon this right in all the elementary works on the subject. Parsons, in his *Maritime Law* (Vol. 1, p. 476), in speaking of the correlative obligations of the owners and the seaman, says that the former stipulate in the contract of hiring "for good treatment and the due payment of wages." In *Abbott on Shipping* (p. 174), it is said: "The duties of the mariners and the master are reciprocal; from the former are due obedience and respect, from the latter protection and good treatment."

George Ticknor Curtiss, in his treatise on the Rights and Duties of Merchant Seamen, takes up, *seriatim*, the general obligations of the parties to the mariner's contract, and which may, or may not, be included in their written agreement, saying (p. 19): "Although the articles are wholly silent upon such points, law and reason will imply certain engagements on the part of the master and owners, which are equally as imperative as those expressed in writing." He then enumerates eight different obligations entered into by the owners as a part of the contract of hiring, the fifth of which is stated in these words (p. 26): "It is further a part of the general obligations of the contract that the mariner shall be treated with decency and humanity by the master and the officers, and by his shipmates," and he concludes the enumeration by saying (p. 28): "These are some of the important obligations assumed by the owner and master in the hiring of mariners."

In 1 *Kay on Shipmasters and Seamen* it is stated (pp. 574, 575): "The crew have rights which are as carefully defined and enforced by law as their duties. Irrespective of statute, the obedience and skill of the seaman entitle them to remuneration, protection, humane and just treatment, proper food, if it is procurable, and care in the event of sickness."

The 16th admiralty rule of the U. S. Supreme Court, provides that in all suits for assault and battery, or beating, the

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suit must be *in personam* only; and Benedict in his Admiralty Practice, commenting on this rule (§ 309) says: "This is, undoubtedly, true where the action is technically for the assault and battery as a mere tort; but it would seem on principle, that if the action be brought on the contract, as for not carrying the passenger safely and without injury, or for not treating wit^h proper kindness a passenger or seaman, an assault or beating, being the gravamen of the breach, the suit may be *in rem* against the vessel."

No distinction is here made between the ill treatment of a passenger and of a seaman. In the very early case of "The Ruckers" (4 Rob. Ad. Rep. 60) it was sought to maintain a libel against the ship for an assault by the master upon a passenger on the high seas, and there does not seem then to have been any precedent for such an action; but as it was conceded that the proceeding would have been upheld if it had been the case of an assault upon a seaman, it was insisted that a passenger was entitled to the same remedy, and it was so held by Sir William Scott.

The inference from the case is, that the seaman's right to reimbursement for injuries of this character antedates, in point of judicial recognition, that of the passenger.

In the case of *Rice v. The Polly and Kitty* (2 Peters 420) the seamen were cruelly beaten by the mate. They appealed to the captain for protection, which he denied them and punished them for complaining. They then left the service, and it was held that the contract of hiring was broken in consequence of their cruel treatment, and that they could recover their full wages.

Judge PETERS, a high authority upon this branch of the law, says (p. 421): "I would observe here, as I did lately upon another occasion, that although the sole contract mentioned in these articles (*i. e.* the shipping articles) on the part of the master or owner, is the payment of wages; yet law and reason will imply other obligations, such as that the vessel should be seaworthy and properly fitted for navigation; that the mariners shall be supplied with sufficient meat and drink;

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and that they shall be treated with, at least, decent humanity." In a foot note it is stated that "the claims of seamen to wages, under circumstances similar to those mentioned in this case, for the whole voyage have been frequently allowed in the District Court by Judge PETERS, and that there are many cases in the English books, in which the principles, on which such claims are founded, have been recognized."

In *Ward v. Ames* (9 Johns. 138), our own courts held that, if during a voyage a seaman is compelled to leave the ship on account of ill usage, or cruel treatment by the master, or through his agency and for fear of his personal safety, the contract is broken and it is not a case of voluntary desertion; and he is entitled to recover his wages for the whole voyage.

To the same effect is *Sherwood v. McIntosh* (1 Ware, 109), where it is said (p. 115): "The seaman engages for the faithful performance of the services, for which he contracted; the master, on his part, engages to treat his men with humanity; and this obligation of the master is not less imperative, because masters do not think it necessary to insert any stipulations in the contract, which may look like restrictions on their part."

There are many other cases in admiralty holding a like doctrine. (*The Minerva*, 1 Hagg Adm. 347; *Linland v. Stephens*, 3 Esp. 269; *Edward v. Trevellick*, 4 Ellis & B. 59; *Steele v. Thacher*, 1 Ware, 91; *Magee v. Ship Moss*, Gilpin, 228; *Relf v. Ship Maria*, 1 Pet. Adm. 186; *The America*, Blatchf. & H. Adm. 185.)

These decisions all proceed upon the ground that cruel treatment by the shipmaster is a breach of the contract of hiring on the part of the owners and relieves the seaman of all further obligation to perform on his part.

In *Croucher v. Oakman* (3 Allen, 185), the Supreme Court of Massachusetts held that in an action of contract by the mate against the owners of the vessel to recover the damages sustained from the unlawful act of the master in wounding and discharging him in a foreign port, while in prosecution of a voyage upon shipping articles signed by him, the plaintiff

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may recover such damages as will compensate him for the injury sustained by him in consequence of the breach of the contract. BIGELOW, Ch. J., says (p. 187): "The principle upon which owners are liable in such cases is this: The defendants, as owners of the vessel, contracted with the plaintiff for the performing by him of the duties of mate for a specified voyage. It was their contract, although made in the name of the master. He was their agent to make and execute it. If it was broken by the wrongful act of their authorized agent, they are bound to make compensation to the party injured."

In *Hunt v. Colburn* (1 Sprague's Dec. 215), it was held that if a seaman is wrongfully left in a foreign port by the master, the owners are liable and the measure of damages is an indemnity for all that he has lost and suffered, including the value of his clothing detained by the master.

The underlying and controlling principle of all these cases is that the sailor is entitled to kind and humane treatment, and to protection from cruelty and acts of oppression on the part of his associates; that a stipulation of that kind is as much a part of the contract of hiring as that he shall have sufficient and suitable food and proper care, and medical attendance in case of sickness, and shall be cured at the expense of the ship owners, without any deduction for loss of services, and the various other provisions which the just spirit of the maritime law has imported into the contract for services in such cases and the observance of which has always been tenaciously insisted upon whenever these contracts have been the subject of judicial scrutiny.

The policy of the law in this respect had become so firmly fixed that it was held by Judge STORY, in *Harden v. Gorden* (2 Mason, 541), that an express written agreement on the part of the seamen to pay for medical advice and medicines was void, and it is intimated that no stipulation contrary to the provisions of the maritime law, to the injury of the seamen, will be allowed to stand, unless supported by an adequate additional compensation, the learned judge using the expres-

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sion, so often quoted, that "they are emphatically the wards of the admiralty."

It does not follow that for injuries received while subjected to a mode of discipline, authorized by the maritime law, the seaman can maintain an action against the owners.

The authority of the master over the crew has been likened to that of a parent over his child, or a teacher over his pupils, or a master over his apprentice. Like them, he must, in the first instance, necessarily be the judge to determine when resort shall be had to corrective measures. The proper discipline of the vessel is indispensable to the successful prosecution of the voyage and is just as much a part of its navigation as the skillful direction of its course, or the careful management of its machinery or apparatus. For an error of judgment in determining when punishment shall be inflicted, or in the selection of the means of chastisement, so long as it is one which is approved by the Maritime Code, or in the application of the means thus chosen, no recovery can be had. But the present case is destitute of any such feature. It is conceded in the prevailing opinion that what the master did was not in the exercise of any disciplinary authority, but was an unprovoked, unjustifiable and brutal assault by him upon the plaintiff. While acting as the representative of the defendants in the discharge of the duty which they owed to the plaintiff to protect him from ill treatment, and clothed with the absolute power to make his authority effective, he deliberately violated the agreement which they had made with the plaintiff.

The complaint alleges a cause of action of this character, for it sets out the contract of hiring, the cruel and inhuman treatment of the master, and the consequent damage to the plaintiff; and we cannot distinguish the case in principle from that of *Scarff v. Metcalf* (107 N. Y. 211), where it was held that in the performance of an obligation imposed by maritime law upon the owners of the vessel, the master stands as the agent and representative of the owners, and his negligence is theirs. It is but a statement in another form of the rule of liability

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carefully preserved by this court in *Crispin v. Babbitt*, where it is declared that the exemption of the employer from responsibility to his servant for the wrongful acts of a co-servant, does not include claims for injuries which are the result of the act of the employer himself, or of a breach by him of some term, either express or implied, of the contract of service or of his duty to his injured servant.

The responsibility of the shipowners does not, therefore, end when they have manned the vessel with officers and a crew, who, they have every reason to believe, are competent and skillful, and supplied it with all the provisions and equipments which the maritime law or regulations may require.

They may have placed on board a supply of food abundant in quantity and unexceptional in quality, and yet if the master, without good cause, should refuse to allow a sailor to partake of it until starvation or exhaustion or other bodily injury resulted, it would not, we think, be contended that the owners were discharged from liability. The vessel may have a suitable medicine chest, and sufficient instructions for its use, and the master might unreasonably deny to a sick seaman the administration of the proper remedies, but the owners would be liable for the resulting injury. A master might compel a disabled sailor to do duty continuously without rest or sleep until overcome, and perhaps permanently injured by fatigue, and the act would be deemed to be that of the owners, as much so as if they had been personally present and directed it.

So we might go through the entire list of the shipowners' obligations to the sailor, and if he has been deprived of the benefit of any of them by the act of the master the owners must bear the responsibility. In such cases the motive with which an obligation is broken is not material.

We have been unable to find any reported case where a different measure of liability for a seaman's injuries has been applied.

There are numerous decisions holding that the shipowners are not liable for the negligent acts of the master or other

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officers in the navigation of the ship, which involve no breach of the contract obligation or duties of the owners. *Benson v. Goodwin* (147 Mass. 237), and *The City of Alexandria* (17 Fed. Rep. 390), are typical of this class. In the former case the sailor was injured by the carelessness of the mate in allowing a part of the apparatus of the ship to fall upon him while they were attempting to weigh anchor under the orders of the captain, and in the latter case the cook fell through a hatchway which had been negligently left open by someone in the ship's employ, and of which the steward had failed to give him notice.

Such authorities have no relevancy or application to a case where, in consequence of the act, default or negligence of the shipmaster, the terms of the contract under which the seaman entered the service have been broken. In other words, the negligence of the shipmaster in doing an act pertaining to the navigation of the ship, and his negligence in performing the stipulations in the contract of his principals, or a duty imposed upon them by law, differ widely in their legal effect. It may well be that for the one the mariner has no remedy against his employer. It was a risk which he impliedly assumed when he entered the service. But for the other the shipowners have bound themselves to be responsible. If they entrust the discharge of their obligations to another they guarantee his fidelity, and his default becomes their default under the well settled rules of law establishing the liability of principals for the acts and omissions of their agents. Two decisions of the Supreme Court of Wisconsin have been referred to as embodying conflicting views upon the question here involved. (*Thompson v. Hermann*, 47 Wis. 602; *Mathews v. Case*, 61 id. 491.) But upon examination it will be found that they are in harmony and support the conclusion we have reached. They also very clearly illustrate the vital distinction which separates the cases where the owners must respond for the consequences of the negligent or wrongful conduct of the master from the cases where they are exempt from such liability. In the 47th Wis. the master

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wantonly and recklessly exposed the sailor against his protest to an unnecessary danger, in consequence of which he was injured. It was a denial to the seaman of that measure of protection which, under the contract of service, he had a right to enjoy, and the owners were made liable.

In the 61st Wis. the master was at the wheel steering the vessel, and negligently or unskillfully steered it lengthwise into the trough of the sea, causing large quantities of water to flow over the deck, washing the yawl boat against the mate and severely injuring him. It was held that the cause of the injury was the negligence of a co-employee, for which the owners were not responsible.

The ill treatment of the plaintiff by the master was not successfully controverted upon the trial. A serious and permanent physical injury has been the result. The verdict was evidently not controlled by sympathy or prejudice, and the charge of the learned judge contained no error of which the defendants can justly complain.

The judgment should, therefore, be affirmed, with costs.

All concur with GRAY, J., except FINCH, O'BRIEN and MAYNARD, JJ., dissenting.

Judgment reversed. _____

THE PRINCE MANUFACTURING COMPANY, Respondent, v.

PRINCE'S METALLIC PAINT COMPANY, Appellant.

One who has adopted a trade-mark to identify his production, and by his labor and skill has created a valuable market therefor, and has induced public confidence in the superior quality of his goods, whether based on the skill used in their manufacture, or in the material from which they are made, or on both combined, is entitled, so long as he deals openly and honestly with the public, to be protected against those who, without right, attempt to appropriate his symbol and apply it to other goods of the same class.

The jurisdiction, however, of equity to restrain the infringement of a trade-mark is founded upon the right of property in the plaintiff and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public, and a party invoking its aid must himself be free from fraud.

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Any material misrepresentation, therefore, in a label or trade-mark, as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity, although the defendant's conduct is without justification.

A party who has secured the confidence of the public in an article manufactured by him and identified by a trade-mark, on the ground that it is made from one material, of which the trade-mark is a guaranty, cannot, without advising the public, substitute another material, although as good as the former, and sell that upon the credit of the true article, and justify the false use of the trade-mark or label on the ground of similar quality.

The owners of a tract of land, upon which was a mine of iron ore known as the "Prince Mine," began the manufacture from the ore obtained therefrom of a metallic paint, which was sold in packages with a label attached containing the words "Prince's Metallic Paint;" this was claimed as a trade-mark. Plaintiff, who claimed to have succeeded to the rights of the original proprietors, as well as its predecessors in the use of the label, represented and warranted the public in believing that the words meant paint made from the ore of said mine, and the credit the article had in the market was owing in part to the belief of the trade that said ore was, as claimed by the proprietors, superior to all other ore used in manufacturing paints. Plaintiff, having acquired title to other mines, applied the label indiscriminately to paint manufactured from their ores as well as to that of the original mine. In an action to restrain defendant from using said trade-mark, *held*, that when plaintiff offered for sale packages of paint with the label attached, it was an implied representation that the paint was the product of ore from the Prince mine, and this representation being untrue, it was not entitled to equitable relief; and this, although it appeared that the article so labeled was as good as that made from the ore of said mine.

Leather Cloth Co. v. American Leather Cloth Co. (11 Jur. [N. S.] 513); *Pidding v. How* (8 Sum. 477); *Perry v. Truefitt* (6 Bea. 66); *Partridge v. Menck* (1 How. Ct. App. Cas. 558); *Manhattan Medicine Co. v. Wood* (108 U. S. 218); *Palmer v. Harris* (60 Penn. St. 156); *Kenny v. Gillet* (70 Md. 574), distinguished.

Argued April 27, 1892; decided October 4, 1892.

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made July 23, 1891, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and granted a new trial.

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This action was brought to restrain defendant from using a certain label or trade-mark.

The facts, so far as material, are stated in the opinion.

Joseph H. Choate and *John Frankenhimer* for appellant. The reversal being upon the facts as well as the law, all the facts, and every question of fact and law, are before this court. And unless it appear that the findings of the trial court are against the weight of proof, the reversal of the judgment by the General Term cannot be sustained. (*Devlin v. G. S. Bank*, 125 N. Y. 756; *Aldridge v. Aldridge*, 120 id. 617; *Sherwood v. Hauser*, 94 id. 626; *Westerlo v. De Witt*, 36 id. 344.) Plaintiffs do not come into equity with clean hands, and, therefore, are not entitled to its protection. (*Cocks v. Chandler*, L. R. [11 Eq.] 446; *L. C. Co. v. A. L. C. Co.*, 11 H. L. 533; *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Palmer v. Harris*, 60 Penn. St. 523; *M. M. Co. v. Wood*, 108 U. S. 218; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Wolfe v. Burke*, 56 N. Y. 122; *Samuels v. Berger*, 24 Barb. 163; *Seabury v. Grosvenor*, 14 Blatchf. 262; *Koehler v. Sanders*, 122 N. Y. 65-76; *Romeyn v. Sickles*, 108 id. 650, 651; *Southwick v. F. N. Bank*, 84 id. 420; *Stevens v. Mayor, etc.*, Id. 296; *Vail v. L. I. R. R. Co.*, 106 id. 283; *Benedict v. S. A. R. R. Co.*, 51 Hun, 111; *Lockwood v. House*, 101 N. Y. 647.) If, as plaintiffs claim and the General Term has found, the trade-mark is a local one, designating the product of the so-called "Prince's Metallic Paint Works," and passed to the plaintiffs with the possession of these "works," then, by reason of their misuse of the trade-mark, plaintiffs have no standing in a court of equity. (*L. C. Co. v. A. L. Co.*, 11 H. L. Cas. 533; *Pepper v. Labrot*, 8 Fed. Rep. 29, 41; *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Kidd v. Johnson*, 100 U. S. 617, 620.) If the trade-mark is not a local one, but a personal trade-mark, then plaintiffs have no standing in a court of equity, because, firstly, they have used the trade-mark without indicating in their use of it that they are or claim to be the transferees of the same from the original proprietor; secondly, they have

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indulged in affirmative misrepresentation by using the words "Established 1858" in connection with the trade-mark, as indicating that the business carried on by them was established in 1858 and that they are in continuous succession to the same. (*Hazard v. Caswell*, 93 N. Y. 259; *Samuels v. Bergen*, 24 Barb. 163.) The plaintiffs' claim of title to the trade-mark, based upon the alleged possession of the so-called "Original Prince's Metallic Paint Works," is not valid. (*Kidd v. Johnson*, 100 U. S. 617; *Morgan v. Rogers*, 19 Fed. Rep. 596; *Hegeman v. Hegeman*, 8 Daly, 1; *D. C. Co. v. Guggenheim*, 2 Brews. 339.) The claim of title through the sheriff's sale of the trade-mark in gross to Charles Meenden is without foundation in law. (*Hazard v. Caswell*, 93 N. Y. 259; *Kidd v. Johnson*, 100 U. S. 617; *Chadwick v. Corell*, 151 Mass. 190; *Hegeman v. Hegeman*, 8 Daly, 1; *Guest v. M. W. Co.*, 142 Penn. St. 610; *Flagg v. Farnsworth*, 16 Phila. 57; *Fox v. H. R. R. Co.*, 8 id. 639; *D. C. Co. v. Guggenheim*, 2 Brews. 339; *Morgan v. Rogers*, 19 Fed. Rep. 596; *Lockwood v. Bostwick*, 2 Daly, 521; *Weston v. Ketchum*, 7 J. & S. 54; *Colton v. Gillard*, 44 L. J. Ch. 90; Brown on Trade-Marks, § 362; Sebastian on Trade-Marks, 10.) Plaintiffs' claim to the trade-mark based upon the so-called tripartite agreement of January, 1880, is invalid. (Morawetz on Corp. [2d ed.] §§ 531, 537; *People's Bank v. St. Anthony's Church*, 109 N. Y. 522; *Fisher v. H. G. Co.*, 1 Pears. 118; *Munson v. S. R. R. Co.*, 103 N. Y. 58; *Abbot v. H. R. Co.*, 33 Barb. 578; *Patridge v. Badger*, 25 id. 146; *Copeland v. C. G. L. Co.*, 61 Barb. 60; *Smith v. N. Y. S. Co.*, 18 Abb. Pr. 419; *Culver v. R. R. E. Co.*, 91 Penn. St. 387.) There was no ratification by the Prince's Metallic Paint Company of the tripartite agreement by reason of the proceedings which resulted in 1889 in a satisfaction of the judgment of David Prince, executor, against Bass. (Morawetz on Corp. §§ 581, 622; *Hayes v. Lycoming Ins. Co.*, 99 Penn. St. 626; *Rodemund v. Clark*, 46 N. Y. 384; *Moller v. Tuska*, 87 id. 166; *Morris v. Rexford*, 18 id. 552, 557; *Fowler v. B. S. Bank*, 113

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id. 450; *Bach v. Tuch*, 126 id. 53.) Defendants stand in the shoes of the Prince's Metallic Paint Company of 1875, and are entitled to interpose whatever defense said company could have interposed against the validity of the alleged corporate transfer of the trade-mark to plaintiffs. (*Reifer v. Honesdale Co.*, 1 Penn. C. Ct. 64; *Flagg v. Farnsworth*, 16 Phila. 57; *Guest v. M. W. Co.*, 142 Penn. St. 610.) Plaintiffs cannot claim the trade-mark on the ground of user since 1879, and abandonment by Prince's Metallic Paint Company since that time, because, firstly, abandonment is not pleaded; secondly, even if pleaded, it is not proven; and thirdly, even if proven, it constitutes no ground for an exclusive right. (*Williams v. B. & A. R. R. Co.*, 17 Blatch. 21; *Menendez v. Holt*, 128 U. S. 514; *A. M. Co. v. Spear*, 2 Sandf. 599.) While the defendants' title to the trade-mark is not necessarily involved in this action, they have pleaded it as a defense in order to make it clear that their claim of title is well founded in law, and is not, as charged by plaintiffs, a flagrant act of piracy. (*Guest v. M. W. Co.*, 142 Penn. St. 610.) The action cannot be sustained as one to restrain unfair trade. No such cause of action was either alleged or proven. (*G. Co. v. G. R. Co.*, 128 U. S. 604; *Koehler v. Sanders*, 122 N. Y. 74; *B. D. Co. v. F. M. Co.*, 114 Mass. 69; *Clark v. Post*, 113 N. Y. 17.) The plaintiffs are in no event entitled to an injunction restraining the defendants from using their corporate name in the business of making and selling paint, because, first, the courts of this state have no jurisdiction to grant such an injunction in this action; and, secondly, even if the court has the power, the plaintiffs have not made a proper case for the exercise of such power. (*Bryan v. U. P. Co.*, 112 N. Y. 382, 388; *Ervin v. O. R. Co.*, 28 Hun, 269; *Galt v. P. S. Bank*, 18 Abb. [N. C.] 431; *Brooks v. M. C. Co.*, 17 J. & S. 234; *Adams v. P. Bank*, 35 Hun, 393; *Wheelock v. Lee*, 74 N. Y. 495; *Burckle v. Eckhardt*, 3 id. 132.) It was no error for the court to refuse to make the findings requested by the appellants, and the exceptions to such refusals are not well taken. (*Thompson v. Bank of B. N. A.*, 82 N. Y. 1;

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Andrews v. Raymond, 58 id. 676; *Stewart v. Morse*, 79 id. 629; *James v. Cowing*, 82 id. 449, 458.)

Frederic R. Coudert and *John S. Davenport* for respondents. The judgment of the General Term being a reversal for errors both of fact and of law, and the appellants having refused a new trial if the record presents any error, either of law or fact, judgment absolute must be rendered for the respondents. (*Caswell v. Hazard*, 121 N. Y. 484; *Cobb v. Hatfield*, 46 id. 533.) The justice at the trial erred materially in supposing himself forbidden by the pleadings to consider anything else than the label or trade-mark as such. (*Springer v. Bier*, 128 N. Y. 99.) The right to use the designation "Prince" for the product of the Prince Metallic Paint Works, as it had been used by various owners for many years before, passed to the plaintiff with the possession of the works. (*A. M. Co. v. Robinson*, 25 Fed. Rep. 217; *Kidd v. Johnson*, 100 U. S. 617; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Congress Springs Case*, 45 N. Y. 291.) The legal and equitable title of the plaintiffs to the label, as such, was fully proved, and should have been found in plaintiffs' favor. (*Ashur's Appeal*, 60 Penn. St. 290; *Lusk's Appeal*, 108 id. 152.) Plaintiffs' various muniments of title, even if defective, could be set aside only by action brought. (*L. M. Co. v. P. M. Co.*, 138 U. S. 537.) Defendants, being merely subsequent creditors, cannot be heard to avoid transfers thus acquiesced in and ratified by the old company, even if not originally regular in all respects. (*Graham v. R. R. Co.*, 102 U. S. 148; *French v. Shotwell*, 5 Johns. Ch. 555; *Ashur's Appeal*, 60 Penn. St. 290.) Acquiescence and ratification estop the old company and all claiming under them from questioning plaintiffs' right. (*Hoyt v. Thompson*, 19 N. Y. 207; *Sheldon Co. v. H. B. M. Co.*, 90 id. 607; *Jordan v. L. I. R. Co.*, 115 id. 380; *Dantziger v. Hoyt*, 120 id. 190; *Kent v. Q. M. Co.*, 78 id. 159.)

ANDREWS, J. It is undisputed that the title "Prince's Metallic Paint" was first applied in the year 1858 by Robert

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Prince and Antoinette Prince, his wife, to paint manufactured by them from iron ore obtained from a tract of land comprising about forty-four acres, owned by Antoinette Prince, situated in Carbon county, Pennsylvania, and upon which the mill and kilns in which the paint was manufactured, were located. The product of the business was sold in packages, upon which a label was affixed, circular in form, and on the rim were printed the words "Prince's Metallic Paint." It is also undisputed that in 1871, after the death of the original proprietors, the title to the forty-four acres and to the business of manufacturing "Prince's Metallic Paint," together with the right to use the label or trade-mark was vested in one Bass, a son-in-law of Robert and Antoinette Prince, who in 1873, organized a company under the name of "Prince's Metallic Paint Company," to carry on the business of manufacturing paint upon the premises, and that Bass and the company organized by him continued the business primarily carried on by Robert and Antoinette Prince until 1875, when the company was organized as a corporation by the same name under a general law of Pennsylvania, in which was vested the title which Bass had held to the ore bed and premises, and to the business and trade-mark before referred to. The corporation conducted the business of manufacturing metallic paint on said land from ore obtained therefrom, and attached the label "Prince's Metallic Paint" to the product, and sold the same under that name until 1879, when the corporation became insolvent. The corporation had meanwhile erected a new and larger mill than the original one, and on land several miles distant therefrom, in which up to the time of the insolvency of the corporation it had manufactured its paint, using, however, exclusively, ore taken from the Prince tract.

In 1878 and 1879 all of the real property of the corporation, viz., the forty-four acres known as the Prince tract, and the land on which the new mill had been erected, was sold under foreclosure of mortgages thereon, and through several mesne conveyances title to one-half of the Prince tract and to the new mill, became in 1879 vested in the plaintiff, "The

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Prince Manufacturing Company," also a Pennsylvania corporation organized in that year, and in which Abraham C. Prince and David Prince were and ever since have been the principal stockholders. The Prince Manufacturing Company immediately upon its organization, entered upon the business of manufacturing metallic paint from ore taken from the Prince tract and from other lands in Carbon county, leased by the corporation, and sold the product under the label "Prince's Metallic Paint," except that paint which was manufactured in the mill on one of the leased tracts, in which a brand of paint known as "Poco Metallic Paint" had been previously manufactured, was when customers desired and when orders were received therefor, branded by the plaintiff as "Poco Metallic Paint" instead of "Prince's Metallic Paint." The plaintiff continued to conduct the business and to use the "Prince" label (claiming the right so to do) without interference from 1879 to 1888, when certain creditors of the "Prince's Metallic Paint Company" of 1875, caused a sale to be made of the franchises of that corporation, upon execution under a statute of Pennsylvania, and became the purchasers and proceeded to reorganize the corporation under the original name pursuant to the authority given by the statute, and the defendant, the new corporation, claims to own the label or trade mark, "Prince's Metallic Paint," as successor of the corporation of 1875, and although it has not conducted the business of manufacturing paint, nevertheless permits Rutherford and Barclay, who are engaged in the business to affix the label to their packages. This new corporation is the defendant in this action.

The plaintiff and the defendant severally claim exclusive title to the label and the right to use it upon packages of metallic paint. Each claim title under the "Prince's Metallic Paint Company" of 1875. The plaintiff claims title from several and distinct sources: *First*, by reason of its ownership of the original mine and works of Robert and Antoinette Prince, derived under the foreclosure sales; *second*, as transferee of the purchaser of the trade-mark on a sale under an execution against

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the "Prince's Metallic Paint Company," issued in 1879, under which the trade-mark was sold *eo nomine*, and which sale is claimed to have been authorized by a statute of Pennsylvania, *third*, under an agreement made between Bass, the president of the corporation of 1875, and subsequently ratified by the corporation.

The defendant denies the title of the plaintiff, and rests its right to the label and trade-mark exclusively upon the effect of the sale and purchase of the franchises of the corporation of 1875, made in 1888, before referred to, and the reorganization proceedings; the claim being that the trade-mark, with the right to manufacture "Prince's Metallic Paint," passed to the purchasers of the franchises as incident thereto, together with the right to reorganize the corporation under the original name.

The judgment dismissing the complaint, rendered at Special Term, was placed by the learned judge upon the failure of the plaintiff to establish any exclusive right to the use of the trade-mark or label upon its goods. The order of the General Term reversing the judgment of the Special Term, proceeded upon the contrary view of the question of title, and the court held that the evidence established the title claimed by the plaintiff. We feel compelled to concur in the judgment of the Special Term dismissing the complaint, on the ground that assuming that the plaintiff had the exclusive right to use the label "Prince's Metallic Paint," it has by its own conduct in the misuse of the trade-mark or label, forfeited any right to apply to the court for protection against its wrongful appropriation by others. This defense was set up in the defendant's answer.

Whatever contradiction may be found in the record as to other facts there is one which admits of no dispute, and that is that from 1858, the year in which the manufacture of metallic paint was established by Robert and Antoinette Prince, until the incorporation of the plaintiff in 1879, the label "Prince's Metallic Paint" had been exclusively applied, first by the originators of the article and, subsequently after their death,

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by their successors in the business, to paint made from ore taken from the so-called original Prince tract of forty-four acres.

The label in its natural and primary signification indicates the nature of the article to which it is attached and also the producer. The words "Metallic Paint" standing alone could not be appropriated as a trade-mark, since they constitute the proper designation of the article by its appropriate name. But the word "Prince," indicating the manufacturer, identified the article to which the label was attached as that produced by him, and no person of a different name could stamp it upon a similar commodity. But the originators of the label, who seem also to have originated the manufacture of metallic paint from iron ore, began to claim that the superior quality of their product was owing to the peculiar quality and purity of the ore found in the mine on their tract of forty-four acres, from which the paint was manufactured, and that it produced a much better quality of paint than could be produced from ore taken from any other part of the same vein.

It was claimed by them that the paint manufactured by rival manufacturers from ore taken from other parts of the vein, known as Lawrence Metallic Paint, Poco Metallic Paint, and Lehigh Metallic Paint, was inferior in color and quality to the Prince's Metallic Paint by reason of the inferiority of the ore from which it was made. These claims were put forth to the trade and the evidence leaves no room to doubt that at the time of the incorporation of the plaintiff, in 1879, and its acquisition of the original Prince tract, the credit which the article "Prince's Metallic Paint" had acquired in the market, was owing in part to the belief of the trade that the ore from the Prince mine was superior to all other ore in Carbon county. The label or trade-mark came to have a broader meaning than it originally possessed, and when attached to packages of paint indicated not only that the paint was made by "Prince" or his successors in business, but also that it was made from ore taken from the original Prince mine, and this latter indication constituted an important element of the good will of

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the business. That these facts were known to the plaintiff was established by the most satisfactory evidence.

The Prince Manufacturing Company (the plaintiff), in September, 1879 (the year it was organized), brought a suit in the Superior Court of the city of New York against Bass and others for an infringement of the trade-mark. In that suit, the plaintiff procured sworn declarations to be made that "Prince's Metallic Paint" could only be made from ore taken from the original Prince vein, and that it was so understood by the trade, and that the ore from that mine was superior to the ore from any other part of the vein. Abraham C. Prince, the president of the plaintiff, declared, among other things, under oath, "that there are in the neighborhood of Prince's Metallic Paint works several other paint factories whose products are known to the trade, but under distinct and separate designations, and that the designations of such products respectively denote to the trade their respective origin. And such paints are preferred and are in demand by the trade according to their locality of origin, as shown by their designations and are not equally esteemed simply because they come from the same general vein or deposit in the neighborhood." And further, "that the trade generally believe the paint manufactured from the ore of the original Prince's mine is superior, and in inquiring for paint with Prince's Metallic Paint label upon it understand paint so produced." In the affidavit of Robert Prince, used by the plaintiff in that suit, he said, "it has always been considered a matter of good faith that the ore for Prince's Metallic Paint should be taken from the original Prince ore bed and works, and I know of no case of its having been taken from any other." The verified complaint in the present action, commenced in 1888, makes the same claim. It alleges the ownership by the plaintiff of the "original Prince Metallic Paint works and mine;" that ever since the year 1858, the "said premises and mine" have been known as Prince's Metallic Paint Works; that the premises consisted and consist of mills for the manufacture of paint and of a "well-known mine or ore bed, which was

discovered by Robert Prince and from which a certain peculiar earth or ore is obtained, which was the basis of the paint known as Prince's Metallic Paint; that the trade-mark or label was invented and arranged by Robert and Antoinette Prince; that the paint distinguished by the label "Prince's Metallic Paint" surpassed all other metallic paints and obtained special favor with consumers, and brought a higher price; that the business of Prince's Metallic Paint works has been conducted continuously since 1858, and that said label or trade-mark has been used exclusively "for designating the product of said metallic paint works and the mines thereto belonging." The tenth paragraph of the complaint declares "that by reason of said use for about thirty years, the product of said paint works and mine is known as Prince's Metallic Paint, and Prince's Metallic Paint is understood to be said product, and no other can be lawfully described as Prince's Metallic Paint." The complaint also, after alleging the infringement by the defendant, asserts that the article manufactured by the defendant is spurious and fraudulent, and is manufactured elsewhere than at Prince's Metallic Paint works, "and from earth not obtained from said mine." These references to the complaint sufficiently show that when this action was commenced, the plaintiff understood that the name "Prince's Metallic Paint" designated and was understood by the trade as distinguishing metallic paint made from ore taken from the original Prince tract of forty-four acres, and that no other could be lawfully described as "Prince's Metallic Paint." This was the plaintiff's claim in 1879, in the suit against Bass and others, and it was reasserted in unequivocal language in the complaint in this action.

It was disclosed on the cross-examination of A. O. Prince on the trial of the present action, that soon after the organization of the plaintiff in 1879, it secured leases of lands in Carbon county, containing the ore from which Lehigh Metallic Paint, Poco Metallic Paint and Lawrence Metallic Paint had been made, and the mills in which it had been manufactured, and that the plaintiff commenced and has continued to use

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ores taken from these leased lands in making "Prince's Metallic Paint." The other paints mentioned, up to 1879 had been sold in competition with "Prince's Metallic Paint." The witness Prince, when pressed for an explanation why the ores from the leased mines were used in making "Prince's Metallic Paint," which the plaintiff in the suit against Bass had declared to be inferior, and how the application of the label to paint manufactured from these ores could be justified in view of the understanding of the trade that "Prince's Metallic Paint" was made from ore taken from the Prince mine, at first stated that at least twenty-five per cent of the ore from the Prince mine was used with the other ores, and this gave the product the requisite color and quality. The witness finally admitted that about one-half of the paint manufactured by the plaintiff, to which the label "Prince's Metallic Paint" was attached, was manufactured wholly from ores taken from the leased lands, but claimed that ore on some of these lands was of the same character and as good as the ore from the original Prince mine, and that the paint manufactured by the plaintiff from such ores was of as good quality as the original paint known as "Prince's Metallic Paint." The plaintiff, as the witness testified, used the ores from the leased lands because the Prince tract did not supply sufficient ore for the plaintiff's business.

The trial judge, among his findings of fact, found that ever since 1879, down to the trial of the action, the plaintiff claimed that the designation "Prince's Metallic Paint," and the label and trade-mark in question, are property applicable only to paint made from ore taken exclusively from the original Prince mine, and that the trade, inquiring for paint with Prince's metallic paint label upon it, understood paint so produced; that ever since 1879, the plaintiff has represented that the paint sold by it under that label was made from ore taken from the original Prince mine, and these findings are followed by a finding that about half the paint sold by the plaintiff as Prince's Metallic Paint, under that label, is made from ore taken from mines other than the original

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Prince mine, and which are not situated upon the original Prince tract.

Upon the facts appearing in the record the plaintiff corporation is seeking to enjoin a fraudulent use by the defendant of a label which it itself is using in violation of its established meaning as a means of selling another product than that to which it could be rightfully applied. According to the definition put upon the label by its originators, as understood by the trade, asserted in the most solemn manner by the plaintiff in judicial proceedings, alleged in the complaint in this action and found by the trial court, the words "Prince's Metallic Paint" designated paint made exclusively from ore taken from the original Prince mine. The designation of the locality from which the ore was taken, implied in the use of the label, was a material circumstance because it was one of the essential grounds of the credit which Prince's Metallic Paint had acquired in the market and contributed to its sale. One-half of the paint sold by the plaintiff under that designation was in no sense the article described in the label. The label was an assurance to purchasers that the paint to which it was attached was made from the ore of the Prince mine, and was a guarantee that they were receiving paint so manufactured. By affixing the label to paint manufactured from other ores the plaintiff availed itself of the credit which pertained to paint manufactured from the Prince ore bed, to put upon the market paints manufactured from other ores, without so far as appears, disclosing the difference of origin. Purchasers were deceived and the plaintiff reaped the advantage of the deception.

The jurisdiction of equity to restrain the infringement of trade-marks is founded upon the right of property in the plaintiff and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public. A plaintiff who has adopted a trade-mark to identify his production, and by his labor and skill has created a valuable market therefor and has induced public confidence in the superior quality of his goods, whether based on the skill used in their manufac-

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ture, or in the material form which they are made, or on both combined, is entitled, so long as he deals openly and honestly with the public, to be protected against those who, without right, attempt to appropriate his symbol to other goods of the same class. In protecting the owner of the trade-mark the public is also protected and deception is prevented. But as was said by Lord ROMILLY in *Cocks v. Chandler* (L. R. [11 Eq.] 446): "The administration of equity is founded in perfect truth." The party who comes into a court of equity for relief against fraud must himself be free from fraud in the matter of which he complains, or, as is frequently said, he must come with "clean hands." The courts have in many cases applied this principle in bar of relief in cases of trade-marks. Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. Although the defendant's conduct is without justification, this, in the view of a court of equity, affords no reason for interference. (See *Leather Co. v. American Leather Co.*, 11 Jur. [N. S.] 513; *Pidding v. How*, 8 Sum. 477; *Perry v. Truefitt*, 6 Beav. 66; *Partridge v. Menck*, 1 How. Ct. App. Cas. 558; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Palmer v. Harris*, 60 Pa. St. 156; *Kenny v. Gillet*, 70 Md. 574; Browne on Trade Marks, chap. 10, and cases cited.)

The present case differs from the cases referred to, in the fact that the misrepresentation in those cases was on the face of the label or trade-mark used, or in written or printed advertisements or circulars, while here the words "Prince's Metallic Paint" do not of themselves embody any representation as to the particular ore used in the manufacture, except as connected with the meaning attached to them by the trade. But this, we conceive, does not distinguish the cases in principle.

The plaintiff and its predecessors, in the use of the label, have by their conduct warranted the public in believing that

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the words "Prince's Metallic Paint" mean metallic paint made by Prince or his successors from the ore of the Prince mine. When the plaintiff offered for sale packages of paint with the label attached, it was an implied representation that it was the product of ore from the Prince mine, and being untrue, the same consequences follow, we think, as though the representation was printed on the face of the label.

Nor is it any answer to this point that the article sold under the name of "Prince's Metallic Paint" was as good as that made from the ore of the original mine. A party cannot secure the confidence of the public in an article on the ground that it is made from one material, of which the trade-mark is a guaranty, and then without advising the public, substitute another material and sell that upon the credit of the true article, and justify the false use of the trade-mark or label on the ground of similar quality. If this was permitted, it would offer a temptation to fraud, and an inferior article might be palmed off on unsuspecting purchasers. And although the false article is as good as the true one, "the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce." (GARDNER, J., *Partridge v. Menck*, *supra*; see also *Phalon v. Wright*, 5 Phila. 464; *Kinny v. Gillette*, *supra*; Browne on Trade Marks, § 496.)

It is probable that the plaintiff has acted without any actual intent to defraud, but what it did upon the evidence and findings operated as a deceit upon the public, and this is sufficient to bar relief.

The attitude of the defendant does not commend itself to a court of equity. Even if its right to use the label was established, it is aiding outside manufacturers to sell their goods under the label of the corporation. But we place our judgment on the inequitable use of the label by the plaintiff.

The conclusion is that the order of the General Term should be reversed and the judgment of the Special Term affirmed.

All concur.

Order reversed and judgment affirmed.

Statement of case.

MARIA TEN EYCK et al., Appellants, v. CATHERINE A. WITBECK et al., Respondents.

One who acquires title to valuable property for a merely nominal money consideration, although actually paid, but under circumstances indicating a gift or advancement, is not within the meaning of the Recording Act (1 R. S. 756, § 1) "a purchaser for a valuable consideration," and his deed, although recorded, conveys no title as against a prior unrecorded conveyance of the same property. The consideration must not only be good, but valuable, in the sense that a fair equivalent is given for the property granted, in order to constitute the grantee a purchaser for value.

In 1871 T., through an intermediate grantee, conveyed a farm to his wife. In 1877 he executed to his daughter W., defendant, a deed of the farm, which was worth \$20,000. The deed stated the consideration to be ten dollars (which sum was in fact paid), and also the annual payment to the grantor during his lifetime of the entire net proceeds of the farm, and thereafter one-third of such proceeds to his wife during her lifetime, if she survived him, one-third to another daughter for the same period, and of one-half to her after the death of both parents. The grantee was given power to sell the property after the mother's death, and if sold the use of one-half the proceeds was to be paid to the sister during life, the principal to be controlled and managed by W. T. continued in possession of the farm until his death, and thereafter it was occupied by his widow and daughter until the death of the former, when W. took possession. The widow, after her husband's death, conveyed the farm to plaintiffs. W.'s deed was recorded in 1879; the deed to plaintiffs in 1883. In an action of ejectment, *held*, that while the consideration of W.'s deed rendered it good as between the parties, she was not "a subsequent purchaser for value," within the meaning of the statute, and her deed, although first recorded, constituted no bar to the maintenance of the action.

Webster v. Van Steenburgh (46 Barb. 211); *Hendy v. Smith* (49 Hun, 510), overruled.

(Argued May 2, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 11, 1891, which affirmed a judgment in favor of defendants, entered upon a verdict.

This was an action of ejectment.

The facts, so far as material, are stated in the opinion.

Statement of case.

Nathaniel C. Moak and *J. H. Clute* for appellants. The General Term erred in deciding as matter of law that the payment of ten dollars to the grantor, the father of defendant Catharine A. by the husband of said defendant, even if he paid it, on her deed being first recorded, under the statute, constituted a bar to the action. (1 R. S. 756, § 1; *Pratt v. Foote*, 9 N. Y. 463; 10 id. 599; *Beach v. Smith*, 30 id. 131; 103 id. 688; *Fort v. Burch*, 6 Barb. 60; *Spicer v. Waters*, 65 id. 231-2; *Pickett v. Barros*, 29 id. 505, 508; *DeLancy v. Stearns*, 66 N. Y. 161-2; *Harris v. Norton*, 16 Barb. 265, 267; *Dickerson v. Tillinghast*, 4 Paige, 215, 221-2; *Rhoades v. Canfield*, 8 id. 547; *Frost v. Beekman*, 1 Johns. Ch. 288, 303; *Boone v. Chiles*, 10 Pet. 211; *Wormley v. Wormley*, 8 Wheat. 449; *Brown v. Welch*, 18 Ill. 346; *Roseman v. Meltes*, 84 id. 297; *Spurlock v. Sullivan*, 36 Tex. 516, 517; *Everts v. Agnes*, 4 Wis. 354; *Worthy v. Caddell*, 76 N. C. 82.) The clause in the deed by Peter W. Ten Eyck to defendant, Catherine Witbeck, that the net rents and profits of the real estate conveyed should during his life be paid to him, and after his death one-third to his widow and a portion to plaintiff Maria during her life, did not, within the cases above cited, make defendant a purchaser in good faith and for a valuable consideration. (*Strickwell v. Conillard*, 129 Mass. 233; *Langdon v. Mayor, etc.*, 6 Abb. [N. C.] 321.) Defendants could only succeed *secundum allegata*. One who claims as a purchaser in good faith must plead all the facts showing he is, and must prove them on the trial. (*Day v. New Lots*, 107 N. Y. 154-5; *Clark v. Post*, 113 id. 18, 27; *Neudecker v. Kohlberg*, 81 id. 296; *Weaver v. Barden*, 49 id. 286, 298-9; *Boone v. Chiles*, 10 Pet. 211, 212; *Harris v. Norton*, 16 Barb. 265, 267; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Dick v. Doughten*, 1 Del. Ch. 320, 326; *Gilder v. Gilder*, Id. 331, 338, 339; *Wormley v. Wormley*, 8 Wheat. 449.)

Matthew Hale for respondents. Defendants were entitled to a verdict on the ground that the defendant Catherine Witbeck was a purchaser in good faith and for a valuable con-

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sideration of the real estate in question, and that her deed was first recorded. (1 R. S. 756, § 1; *Hendy v. Smith*, 49 Hun, 510; *Wood v. Chapin*, 13 N. Y. 509.) The other consideration expressed in the deed, namely, the obligation on the part of the grantee to collect the proceeds of the property, to pay the expenses and taxes, and to pay over the proceeds, is sufficient to sustain the claim of defendant Catherine Witbeck, as a purchaser in good faith and for a valuable consideration within the meaning of the Recording Act. (*Trotter v. Hughes*, 12 N. Y. 74; *A. D. Co. v. Leavitt*, 54 id. 35; *Post v. W. S. R. R. Co.*, 123 id. 580.) The court properly denied the request of plaintiffs to direct a verdict in their favor. (*Elwood v. W. U. T. Co.*, 45 N. Y. 549.) The plaintiffs' requests to charge were not made in such a way that the exceptions taken to the alleged refusals thereof can be considered by this court. (*Tinkham v. Thomas*, 2 J. & S. 236.)

MAYNARD, J. The single question presented by this appeal relates to the rights of the parties under the Recording Act. The property in controversy is a farm in the town of Coeymans concededly worth \$20,000. Peter W. Ten Eyck is the common source of title. The plaintiffs claim under a deed prior in date; the defendant Catherine Witbeck under a deed prior in registry. The plaintiffs' conveyance is declared by statute to be void as against the defendant, providing she was a purchaser in good faith and for a valuable consideration. In the sense that she had no notice of the existence of the prior deed, the *bona fides* of her purchase is not disputed. The issue is, therefore, narrowed to the question whether she was a purchaser for a valuable consideration. The deed was executed July 7, 1887. The grantor was her father, and it recited a consideration of ten dollars and the annual payment to the father during his lifetime of the entire net proceeds of the farm, and of one-third of such proceeds to his wife during her lifetime, if she survived him, and of one-third thereof to another daughter for the same period, and of one-half of such proceeds to her after the death of both parents. The grantee

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was given power to sell the property after the mother's death, and, if sold, the use of one-half of the proceeds of sale should be paid to the sister during her life, but the principal should be managed and controlled by the defendant. It was proved that ten dollars in money was actually paid by her to her father at the time of the execution of the deed. Peter Ten Eyck's family then consisted of his wife and two daughters who lived with him upon the farm, except the defendant Mrs. Witbeck, who lived with her husband upon another farm in the same town. Immediate possession was not taken by her under her deed, but her father, with the rest of the family, continued to reside upon the farm, and, by himself and tenants, to manage and control it until his death in 1883, after which it was in the same manner occupied by the mother and unmarried daughter until the death of the mother in 1885. In September, 1871, Ten Eyck, through an intermediate grantee, conveyed this property to his wife, who, in January, 1883, conveyed it to the plaintiffs. The defendant's deed was recorded December 5, 1879, but Mrs. Ten Eyck's deed, under which the plaintiffs claim, was not recorded until February 21, 1883.

After Mrs. Ten Eyck's death, the defendant took possession and the plaintiffs brought this action in ejectment. The defendant challenged the validity of the plaintiffs' title, upon the ground of the mental incompetency of Mr. Ten Eyck, and the undue influence of his wife over him when the deed to her was executed, and of its alleged non-delivery, as well as the non-delivery of the deed from Mrs. Ten Eyck to the plaintiffs; and upon the further ground that Mrs. Ten Eyck's deed was void as to defendant, under the Recording Act.

The trial court held that the defendant was not a purchaser for a valuable consideration, and was not, therefore, within the protection of the statute; but submitted to the jury the question whether the deeds, under which plaintiffs claimed, had ever been delivered; and whether Peter W. Ten Eyck was of sound mind and free from undue influence when he executed the conveyance to his wife. The verdict was for the

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defendant, and the General Term intimate very plainly that, in their opinion, it was not supported by the evidence, and that they would have set it aside were it not for the decision of the General Term in the fifth department in the case of *Hendy v. Smith* (49 Hun, 510), which holds that a grantee for a consideration of one dollar paid, is a purchaser for a valuable consideration, as the terms are used in the Recording Act. They felt constrained to regard this authority as controlling, and to hold, as matter of law, that the defendant had a superior title because of the prior record of her deed, and that the verdict and judgment were, therefore, right. The order of affirmance states that, but for the Recording Act, the judgment appealed from would have been reversed.

From the relationship of the parties; the recitals in the defendant's deed; and the circumstances attending its execution, as disclosed by the evidence, it is, we think, apparent that she cannot be regarded as a purchaser for a valuable consideration, so as to avoid the effect of the plaintiffs' prior conveyance. While every legal mode of acquisition of real property, except by descent, is denominated in law a purchase, and the person who thus acquires it is a purchaser, it is evident that the word is used in this statute in a much more limited sense. It is there applied only to such grants of real estate as are obtained for money, or some other valuable consideration. It denotes a buyer of property and has reference to one of the actors in a transaction of bargain and sale, which is presumably controlled by commercial considerations.

We think it would be a perversion of language to say that a father, who had conveyed to a daughter property of the value of twenty thousand dollars for no greater sum than ten dollars paid, had sold the property to his child, or that she had bought it of him. The transfer would be recognized by the popular, as well as the judicial mind, as possessing all the essential qualities of a gift. It has been frequently so held. In *Hayes v. Kershaw* (1 Sand. Ch. 265) the consideration recited in the deed was one dollar paid and love and affection, and the vice-chancellor said that this nominal sum was not

such a valuable consideration as would support a bargain and sale.

In *Duvol v. Wilson* (9 Barb. 487), the conveyance was to the grandchildren of the grantor; and recited a consideration of five dollars paid; and it was held that it was not sufficient to support a covenant to stand seized.

In *Morris v. Ward* (36 N. Y. 587) the conveyance was to a granddaughter and recited a consideration of one dollar paid and natural love and affection, and this court held that it was an advancement and not a sale, and that the grantee took as donee and not as purchaser, and that it was competent, when the whole instrument shows the money consideration to have been intended as nominal merely, to give effect to such proof and to the intention which it indicates.

It is true that in these cases it was assumed, or conceded, that the nominal money consideration expressed had not been actually paid; but we do not understand that any emphasis was placed upon that fact. The decision in each case seems to have been put upon the ground that the nominal was not the real consideration.

In the case before us every feature of the transaction is indicative of a gift. The grantor was eighty-two years of age, and the grantee was his eldest daughter. He was evidently conscious that the end of his life was near and desired to make some final disposition of his real property for the benefit of his family through the medium of this daughter, in whom, for the time being, he seems to have had especial confidence. If in the full possession of his mental faculties, he must have known that he had previously conveyed the property to his wife. Apparently there was a struggle between the different members of his household for the possession and control of the farm, which destroyed that quietude and repose so grateful to old age. He may have thought that in this way he could appease both factions, trusting that each might remain in ignorance of the status of the other until he died, when the result of the complications which he had created would be a matter of indifference to him. But we need not speculate as

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to his motives We must deal with the fact of the execution of the later deed as we find it on the record, and the extent and quality of its consideration as shown by the proofs. It is plain that the real consideration which the grantor had in mind when he made the conveyance was not the receipt of an insignificant sum of money, but the provision which he was thereby making for the benefit of the different persons who composed his family, and all of whom had just claims upon his bounty. By its terms no one in fact would enjoy the use of the property until after his death, for he reserved to himself the entire net rents and profits during his lifetime. The instrument was, therefore, most emphatically of the character, and intended to take the place of, the usual testamentary distribution of a decedent's property.

So far as the cases of *Webster v. Van Steenburgh* (46 Barb. 211) and *Hendy v. Smith* (*supra*) hold a contrary doctrine they do not have our approval.

On the other hand, the cases of *Fullenwider v. Roberts* (4 Dev. & Bat. 278); *Worthy v. Caddell* (76 N. C. 82); *Upton v. Basset* (Cro. Eliz. 445); *Doe v. Routledge* (Cowp. 705), and *Metcalfe v. Pulvertoft* (1 Ves. & Bea. 183), so far as they hold that a purely nominal consideration is insufficient to protect the subsequent purchaser, are in harmony with the views we have expressed.

We deem it unnecessary to undertake to determine here what degree of adequacy of price is required to uphold a subsequent deed first recorded. Upon this branch of the case we have no occasion to go, farther than to hold that a small sum, inserted and paid, perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself, satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration. Where the subsequent conveyance is a mortgage, and only part of the consideration paid, there can be but little difficulty in properly adjusting the equities of the parties, for the mortgagee can then be considered as a *bona fide* purchaser, *pro*

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tanto, and the mortgage enforced to the extent to which he has parted with value upon the faith of it. (*Merritt v. Northern R. R. Co.*, 12 Barb. 605; *Pickett v. Barron*, 29 id. 505; *Williams v. Smith*, 2 Hill, 301; *Stalker v. McDonald*, 6 id. 96; *Peabody v. Fenton*, 3 Barb. Ch. 451.)

But in case of a deed having a mixed consideration, that is, partly valuable and partly good, such a rule would be difficult of application, if not impracticable, and no case has been cited where the question has arisen in that form. There is an *obiter* remark by Judge HAND, in *Merritt v. Northern R. R. Co.*, that such a grantee may be considered a purchaser for value as to the entire title. The point, however, is not involved in a case like the present, where the money consideration is purely nominal, or infinitesimal in amount, when compared with the value of the property granted, and is shown not to have been the real inducement of the grant.

It is proper to observe here that the good faith of a purchaser may be seriously impaired, if not destroyed, by the inadequacy of the price at which the property is offered by a person claiming to be its owner. If the sum which the seller is willing to take is grossly disproportionate to the value of the thing which is the subject of the negotiation, it is strong proof of a defective title and sufficient to put a prudent man upon inquiry, and if the buyer neglects to diligently prosecute such inquiry, he may not be awarded the standing of a *bona fide* purchaser.

It may be said that this rule would not hold good where the relation of parent and child exists, because of the natural and laudable desire of the former to share his worldly possessions with the latter, which is merely equivalent to saying that the actual consideration in such cases is not a pecuniary one.

It is strenuously urged by counsel that the considerations expressed in defendant's deed, other than money, are sufficient to invest her with the title of a purchaser for value. It is not important to determine how these provisions should be construed; whether as reservations out of the property granted,

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or as creating a trust for the benefit of the grantor and others, or as implied covenants on the part of the grantee to annually account for the net income of the property in the manner specified. Unquestionably, as between the parties, the defendant, by the acceptance of the deed, became bound to observe its conditions, and to render to the beneficiaries named their respective shares of the net rents and profits of the farm. But this was simply an obligation to account for the use of the property, which was the subject of the grant, and while it might be a good consideration for the conveyance, it was in no respect a valuable consideration as that term has been judicially defined. If, for any cause, the grant itself becomes nugatory, the covenant ceases to be operative. In order to give effect to the promise, effect must be given to the deed, and if the defendant is deprived of the land, she is relieved from the obligation which she assumed on the faith of the grant. (*Dunning v. Leavitt* 85 N. Y. 30; *Rice v. Goddard*, 14 Pick. 293.)

There is a wide distinction between a good and a valuable consideration, when the latter term is used in the statutes defining the rights of a subsequent purchaser. Blood, love and affection, future support, a precedent indebtedness and the like, are, either of them, sufficient as a consideration between the parties, but neither is potential enough to override the prior equities of others in the property conveyed.

The phrase "a purchaser in good faith and for a valuable consideration" is not peculiar to the Recording Act, but is one of frequent occurrence in the statutes. It can be found in the chapters on trusts (4 R. S. [8th ed.] p. 2437, §§ 51, 54); on powers (Id. 2451, § 132); on conveyances (Id. 2452, § 144), and on frauds (Id. 2593, § 5). It is an expression which has been borrowed from the language of courts of equity, and should be interpreted in the sense in which it is there understood. As pointed out by Chancellor WALWORTH, in *Dickerson v. Tillinghast* (4 Paige, 215), it has a curious and instructive history in connection with its introduction into the Recording Act. The English registry law made the prior unrecorded

deed wholly void as against the subsequent grantee, without reference to the question of notice, or the payment of value. Immediately, the Court of Chancery, with characteristic diligence, sought to relieve the earlier grantee from the hardship which the enforcement of the letter of the law might inflict, and, while respecting the command of the statute, which made his deed void at law, it invested him with an equitable title, which it declared should prevail over the legal title of the subsequent purchaser, if it appeared that he had notice of its existence, or did not part with value at the time of the purchase. This rule of judicial construction was incorporated by the legislature into the *lex scripta* in almost the identical words in which it had been phrased by courts of equity. A valuable consideration has been defined by writers upon equity jurisprudence as something "which the law esteems as an equivalent given for the grant, and it is, therefore, founded on motives of justice." (1 Story Eq. Juris. [10th ed.] § 354.) If the subsequent grantee does not give up any security, or divest himself of any right, or place himself in a worse situation than he would have been, if he had received notice of the prior equitable title or lien, previous to his purchase, he will not be permitted to retain the legal title to the injury of the prior grantee.

Or, as it was tersely stated by ALLEN, J., in *Weaver v. Barden* (49 N. Y. 291), a purchaser for a valuable consideration is a purchaser "for value paid." This limited application of the term is entirely consistent with the scope and purpose of the Recording Act, which was declared by the chancellor in *Dickerson v. Tillinghast*, to be the protection of those "who should part with their money, property, securities, or other valuable rights, upon the faith of a conveyance or mortgage of real estate, supposing they were getting a good title thereto or a legal or specific lien thereon without notice, or having any reason to believe that there was any previous mortgage or conveyance which could defeat such title or lien."

If the rejection of the later conveyance will leave the grantee in the same position, with respect to his property rights, as he

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occupied before its execution and acceptance, he cannot be permitted to aid, however innocently, the fraudulent grantor in his effort to defeat a prior conveyance by him of the same lands. Where the grantee parts with nothing of substantial value, he must be satisfied if he receives nothing, because his grantor had nothing which he could honestly convey. The considerations, other than money, upon which the defendant relies, when submitted to this equitable test, fall far short of satisfying its requirements. If her deed is adjudged void, she has not lost or sacrificed anything which she possessed when it was executed, nor become incumbered with any promise or obligation, which will result in a future loss or sacrifice. She has, therefore, failed to establish her title as a purchaser for a valuable consideration.

Whether there was sufficient evidence to go to the jury upon the issue of fraud and undue influence in the execution of the deeds under which the plaintiffs claim, or of their non-delivery, we cannot now consider. The General Term has not yet passed upon that question.

The order appealed from should be reversed and the case remitted to the General Term for a review upon the facts, with costs to abide the event of the action.

All concur.

Ordered accordingly.

185	50
161	899

185	50
f168	47
f168	507

JABEZ FURNER, Respondent, v. OTIS SEABURY, Appellant.

In an action to restrain defendant from interfering with the water of a certain spring, etc., the following facts appeared: In 1852, defendant granted to C., under whom plaintiff claims, and who owned an adjoining farm, for the use of said farm "all the water of said spring which can be conducted through one-half inch lead pipe," to be laid by C. All the water of said spring came through a crevice or opening in a rock fifteen inches below the surface. C. boxed the spring and laid pipe therefrom as stipulated, and thus conveyed the water to his farm. There was another spring upon defendant's farm about thirteen feet from the one in question, the water from which he conveyed to his house, and which furnished an abundant supply therefor. In 1884 and 1888, plaintiff without the consent, and against the protests of defend-

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ant, excavated the basin of his spring about twenty-three inches tapping the vein which supplied defendant's spring thus diverting the water therefrom. Defendant filled up the excavations so made restoring the spring to its original condition. *Held*, that the grant to C. had reference simply to the spring as it then was; that it was not intended by it to make defendant's whole farm servient for a supply of water that would flow through a one-half inch pipe; that plaintiff had no right to dig lower than was necessary to take the water flowing from the crevice in the rock, and by so doing he became a trespasser, and defendant had the right to fill in the excavations thus made; and so, that the complaint was properly dismissed.

Johnstown Cheese Manufacturing Co. v. Veghte (69 N. Y. 16); *Huntington v. Asher* (96 id. 604), distinguished.

Furner v. Seabury (59 Hun, 272), reversed.

(Argued May 4, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made February 3, 1891, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term and granted a new trial.

This was an action to restrain defendant from drawing or interfering with the water of a certain spring which plaintiff claimed he owned. A permanent injunction was asked for and also damages for injuries already sustained by reason of such alleged unlawful interference.

In August, 1852, the defendant and William Colson owned adjoining farms in Madison county. Upon the defendant's farm there was a spring of water, in which Colson, for the benefit of his farm, desired to acquire an interest, and then they entered into a written agreement, which, after reciting the existence of the spring upon the defendant's farm, and its location, provided as follows: "That the party of the second part, for and in consideration and agreement on the part of the first party, that he, the party of the second part, hereby agrees to convey the water from said spring in three-fourths inch lead pipe, which is to be laid under ground of sufficient depth to preserve said pipe from injury by frost or other causes. The party of the second part is to carry said water as above described into the meadow of the party of the first part

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in consideration of the foregoing agreement on the part of the party of the second part; the party of the first part has hereby granted, bargained, sold, released and confirmed, and by these presents does grant, bargain, sell, release and confirm unto the said party of the second part, his heirs and assigns, all the water of said spring which can be conducted through one-half inch lead pipe; the party of the second part has the right to all the water which can run through said one-half inch pipe, said half inch pipe to be inserted at the termination of the three-fourths inch pipe as before described, to be constructed and kept in repair at the cost, charge and expense of the party of the second part, to have and to hold all and singular the same easement and privilege to the said party of the second part, his heirs and assigns forever as appurtenances belonging to his and their lands as aforesaid."

Colson's farm and his rights in the spring under the agreement came by successive conveyances to the plaintiff in 1867, and he has since owned the same. The lead pipes mentioned in the agreement were placed in the ground and connected with the spring, and the water of the spring was thus used by the plaintiff and his predecessors and by the defendant harmoniously, as provided in the agreement, until a few years ago, when the water of the spring being insufficient at times for both parties, defendant attempted to procure water from another spring about thirteen feet from the spring mentioned in the agreement, and the plaintiff, claiming that the defendant thus interfered with the water of the latter spring, commenced this action. The facts found by the trial court, so far as they are material, are as follows:

"That in the month of September, 1852, or thereabouts, the said Colson cleaned out the said spring and inserted in it a box sixteen inches deep upon the west side, and eighteen inches deep upon the other three sides; two feet three and a half inches long and twenty-three inches wide inside, thereby inclosing in said box water from said spring; and attached and inserted through said box into said spring a three-fourth inch lead pipe and continued said pipe under ground from

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said spring through the defendant's land to the meadow of the defendant, as provided in said instrument; and at the termination of such three-fourth inch pipe attached to said pipe a half inch pipe and continued the same through the land of the defendant to and through the land of Colson to the house of said Colson.

"That in the fall of 1854 the defendant, with the permission and acquiescence of said Colson, attached a one-half inch lead pipe to the three-fourth inch pipe of said Colson about twenty rods from said spring, and upon the land of the defendant, and continued said pipe from where it was thus attached through his land to the house of the said defendant, for the purpose of obtaining water from said spring for use at his house; and that said pipe remained thus attached to said three-fourths inch pipe, until the same was detached therefrom by the defendant in the fall of 1886.

"That for the period of twenty years prior to the defendant detaching his one-half inch pipe from the three-fourths inch pipe of the plaintiff in the fall of 1886, as hereinbefore found, there had been a failure of water through the defendant's pipe, or an insufficient supply thereof to the defendant's house, so that the defendant at many times during said years was obliged to obtain water through said defendant's pipe to his house, sometimes for a period of two weeks, sometimes four weeks and sometimes six weeks, according to the dryness of the season; that from 1876 until the defendant detached his pipe from the pipe of the plaintiff in 1886, when it was dry there was a failure of water through the defendant's said pipe; that in 1876, in 1879 and in 1882 the water entirely failed to run through the defendant's said pipe for a period of six weeks or thereabouts, to the defendant's house, and the defendant by reason thereof was obliged to obtain water from his well.

"That at the time the defendant executed said instrument, dated August 20, 1852, granting to said Colson the privilege therein mentioned to water from the spring therein described, he, the defendant, was the owner of another spring located

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about thirteen feet southeast from the spring in question ; that such spring has ever since existed there ; that the water came up out of the ground at said spring, and flowed off from the spring down the hill into the ravine below, uniting in the ravine with the water from the spring in question. That said spring is designated in the testimony as spring 'C.' That since the execution of said instrument by the defendant to said Colson, there has been, and at the time of the execution thereof there was another spring owned by the defendant located on his land about thirty-three feet southwest from the spring in question, and designated in the testimony as spring 'B.' That in the fall of 1886 by reason of the repeated either entire failure of water through the defendant's pipe, or an insufficient supply thereof through said pipe thus attached to the plaintiff's said pipe, the defendant for the purpose of obtaining a sufficient supply of water to his house for household purposes and for the use of his stock, dug out his springs designated as springs 'C,' and 'B ;' sank a barrel into spring 'C,' and a hollow log into spring 'B,' detached his one-half inch pipe from the said pipe of the plaintiff and connected a pipe with the pipe thus detached, continuing the same from the pipe thus detached to spring 'C,' and inserted such pipe into that spring. That he inserted a pipe at the same time into his spring 'B,' and connected that spring by an underground pipe with spring 'C.' That the said defendant at once after thus utilizing said springs 'C,' and 'B,' as hereinbefore found, obtained an abundant supply of water from these two springs through his pipe to his house ; and which abundant supply continued until the plaintiff, in August, 1888, dug down the spring described in the instrument to Colson, when there was an entire failure of supply of water from the defendant's said springs to his house for several days ; and that the supply of water therefrom continued to fail until late in the fall of said year, 1888 ; and that the failure of water from defendant's said springs through his pipe to his house was caused by the plaintiff digging down the spring described in the instrument to Colson, as hereinafter found."

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That upon the west side of the spring mentioned in defendant's said instrument to Colson, there was at the time the same was executed, and still is, a solid rock which comes up to the surface of the ground; that fifteen inches below the top of that rock there was, and still is, an opening in the rock about the width of the box which has been inserted in the spring by Colson; that through this opening the water flowed, and that this aperture in the rock was the inlet to said spring, and that the source of said spring then was and still is the water which come out from under this rock fifteen inches below its top. That the box which was placed in said spring by Colson in 1852, and which box, or a similar one, remained there until taken out by the plaintiff in 1884, as hereinafter found, was two inches less in depth upon the west side against the rock than upon the other three sides; that the two inches upon the west side, or against the rock, was left off at the bottom of the rock in order to let the water come in from the inlet into the box, and that the box on this side came down just to the top of the opening in the rock and to said inlet to the spring; that said box was of sufficient size and depth, and answered the purpose of securing and inclosing the water which flowed from said spring through said aperture in the rock.

"That the said spring is composed of the water which flowed out from the hillside from the said aperture in said rock; and that the water thus flowing from said opening in the rock constituted said spring.

"That in 1884, the said plaintiff unlawfully took out the box then in said spring, and without the consent of the defendant, dug down eight inches below the bottom of the box thus taken out by him; digging a space of sufficient dimensions to insert a box two feet four and a half inches deep, two feet and ten inches long, and two feet ten inches wide; and then and there unlawfully, and without the consent of the plaintiff, inserted a box of those dimensions in the place of the box thus taken out by him.

."That in August, 1888, the said plaintiff unlawfully, and without the consent of the defendant, dug down at said spring

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fifteen inches below where he had dug in 1884, and until he struck a solid rock; that he inserted at the bottom of this excavation the box that he had inserted in the excavation of 1884, and on the top of it put another box; that he then dug the ditch from the spring for several rods below it about one foot deeper than it had heretofore been, and attached his pipe into the box about a foot lower than it theretofore had been, and below the said spring; that the defendant, at the time the plaintiff was doing said acts, forbade the plaintiff doing the same; that the plaintiff, while doing said acts, asserted that he had the right to dig down fifty feet if he chose so to do. That all of said acts of the said plaintiff hereinbefore stated in this finding were unlawful acts on his part.

“That on the 15th day of January, 1889, the said defendant lawfully filled up the excavations made by the plaintiff at the said spring and below it in 1884 and 1888, restored the condition of said spring to the condition it was in at the time the plaintiff interfered with it in 1884, placed in said spring a box of the same dimensions and in the same manner that the box was in, which was taken out by the plaintiff in 1884, and on the eighteenth day of January thereafter, made to the plaintiff the following statement: Mr. Turner, I have filled up and restored the spring to the condition it was in when I conveyed to Mr. Colson the right to attach a pipe to the spring, and take the water from it through such pipe, and to the same condition the spring was in when you purchased the right of Colson, I deny your right to dig down this spring as you did, and attach your pipe to it where you did, after you had thus dug it down; that act of yours interfered with and cut off the water from another spring of mine near this one.

“I have made a hole in the box which I have put into the spring as I have restored it, so that all you have to do is to attach your pipe to the spring, as it now is, to obtain the water you are entitled to from this spring, and I admit your right to the water from this spring to the extent that such right was granted by my conveyance to Colson; and I claim I am in no manner interfering, in what I have done in restoring this spring, with

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any right which you have as purchaser to attach a pipe to the spring and use the water therefrom which you are entitled to.

"Dated January 17, 1889."

"That on the 19th day of January, 1889, the plaintiff unlawfully dug down at this spring and below the same to the same depth that he had dug in August, 1888, and replaced in the excavation thus made by him the boxes that he had placed in the excavation made in August, 1888, and replaced the pipe as he had then placed it.

"That on the 8th day of April, 1889, the defendant lawfully filled up the excavation thus made by the plaintiff, precisely as he had done on the 15th day of January, 1889, and placed therein the same box that he had placed therein at that time and in the same manner; and again, on or about the 18th day of April, 1889, made the same statement to the plaintiff that he had made to him on the 18th day of January, 1889, informing him that he had again filled up and restored said spring as he had done the preceding January.

"That in the night-time, April 17, 1889, the said plaintiff again unlawfully dug down at the spring and below the same to the same depth that he had theretofore dug, as hereinbefore found; and replaced in the excavation thus made by him the boxes that he had placed in the excavations made by him, as hereinbefore found, and replaced the pipe as he had theretofore replaced it as above found; that after thus doing, and early in the morning of the same day, the plaintiff commenced this action against the defendant by the service of a summons and complaint therein, and an injunction order restraining the defendant, as set forth in said order, from interfering, as alleged by the plaintiff, with said spring, having obtained said injunction order the day preceding.

"That the acts of the plaintiff in digging down below the spring in question, in August, 1888, January, 1889, and April, 1889, had the effect of cutting off to an extent, the supply of water from the defendant's spring 'C,' which he was then using, and to the extent of causing an injury to the defendant by depriving him of the supply of water from his spring 'C,'

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which he would otherwise have had from said spring; and that the effect thereof was to such an extent that, after the plaintiff had made the excavation hereinbefore found in August, 1888, and on the same day he made the same, the water from defendant's spring 'C' entirely failed to run through his pipe for several days and thereafter continued to thus fail until quite late in the fall of that year, to the extent that the defendant did not have a sufficient supply of water through said pipe, 'that until the plaintiff had made said excavation the defendant had invariably had a sufficient supply of water to his house through his pipe from said spring 'C.' That none of the acts of the defendant hereinbefore found to have been done by him were malicious acts, but were acts done by him in good faith and for the sole purpose of enabling him to obtain a needful supply of water from his two springs wherefrom he was obtaining the same as hereinbefore found.' And the trial judge refused upon the plaintiff's request to find the following facts: That the digging out of spring 'C,' by the defendant directly diverted the water from the plaintiff's spring, and that the plaintiff was thereby deprived of water from his spring for considerable periods of time, and that the direct result of the defendant's act in digging out spring 'C,' and connecting his pipe with the barrel placed therein and drawing water therefrom was to drain the plaintiff's spring and deprive him of the water thereof; and he found the following conclusions of law:

"That all of the acts of the defendant found to have been done by him, respecting his two springs in 1886, were lawful acts, and that he had the legal right to avail himself of the water from those two springs in the manner he did, and that in thus doing, he did not unlawfully interfere with any rights owned or acquired by plaintiff by virtue of the instrument executed by the defendant to William Colson, August 20, 1852.

"That the acts of the plaintiff in digging down at this spring in 1884, in August, 1888, on the 19th day of January, 1889, and on the 17th day of April, 1889, as found

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in the eleventh, thirteenth and fifteenth finding of facts, were all of them unlawful acts.

"That the acts of the defendant in filling up the excavations made by said plaintiff at said spring and below it in 1884, 1888, and January 19th, 1889, and placing in said spring on the 15th day of January, 1889, and on the 8th day of April, 1889, a box of the same dimensions, and in the same manner that the box was in which was taken out by the plaintiff in 1884, and being the acts of the defendant stated in the twelfth and fourteenth proposed findings of facts, were all of them lawful acts.

"That the defendant is entitled to a judgment in this action dismissing the complaint therein, and dissolving the injunction therein, and that the plaintiff be adjudged to fill up the excavations made by him at said spring on the 17th day of April, 1889, and to replace in said spring a box similar to the one taken therefrom by him at the time he made said excavation and to restore said spring to the same condition that it was in at the time he commenced making the said excavation on the 17th day of April, 1889."

Upon these findings the defendant entered judgment against the plaintiff.

Further facts are stated in the opinion.

D. W. Cameron for appellant. The trial court decided correctly in holding that the acts of the defendant, found to have been done by him, respecting his two springs in 1886, were lawful acts; and that he had the legal right to avail himself of the water from those two springs in the manner he did; and that in thus doing he did not interfere with any rights owned or acquired by the plaintiff by virtue of the instrument executed by the defendant to William Colson August 20, 1852. (*Bliss v. Greeley*, 45 N. Y. 671; *Magoon v. Harris*, 46 Vt. 264.) The trial court did not err in deciding that the acts of the plaintiff in excavating below the spring in question, as he did in 1884, 1888 and 1889 were unlawful; and that the acts of the defendant in replacing said excavations and restoring

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the spring in question to the same condition that it was placed in by Colson in 1852, and used by him and his grantors, including the plaintiff, from that time to 1884, were all of them lawful acts. (*Bliss v. Greeley*, 45 N. Y. 674.) The acts of the plaintiff in excavating below the spring in question, as he did in 1884 and 1888, were unlawful, and were acts of trespass upon the lands of the defendant. (Gould on Waters, § 291; 15 Penn. St. 164; 55 N. Y. 275.) The extent of the right of the plaintiff to use the spring in question had been established and fixed by a user of thirty-two years; twenty-one years of which was by the plaintiff. A period of thirty-two years was amply sufficient to determine what rights and privileges were necessary as incident to the expressed provisions of the grant. (*Roberts v. Roberts*, 55 N. Y. 275; *Tyler v. Cooper*, 47 Hun, 94.)

John E. Smith for respondent. The defendant, having granted a certain and specific quantity of water from the spring in question, was thereby precluded from doing any act or thing on his own land tending to interfere with or diminish the quantity of water to plaintiff within the grant. (*Whitehead v. Parks*, 2 H. & N. 870; *J. C. M. Co. v. Veghte*, 69 N. Y. 17.) If the defendant claims that the grant is vague and uncertain in its provisions, then the parties have, during the past thirty years and more, given every uncertain point an interpretation, and the agreements became definite and certain in those particulars by reason of the acts of the parties in the premises. (*Tyler v. Cooper*, 47 Hun, 94; 2 Washb. on Real Estate [3d ed.], 278; *Fisk v. Wilber*, 7 Barb. 395; *Bliss v. Greeley*, 45 N. Y. 671.)

EARL, Ch. J. As the order of reversal in this case does not appear to have been based upon any question of fact, we must assume that the judgment was reversed for some supposed error of law. (Code Civ. Pro. § 1338.) No complaint is made of the rulings of the trial judge upon the trial, and, therefore, if the findings of facts justify the conclusions of law the judgment of the Special Term should stand, unless some material finding

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of fact is without any evidence to sustain it, or unless the trial judge refused, upon request of the plaintiff, to find some material fact sustained by uncontradicted evidence.

It is clear that the parties to the original agreement about the spring were dealing with some particular spring, and that the defendant did not intend absolutely to grant water which would fill or flow through a one-half inch pipe, and thus make his whole farm servient for that quantity of water. The language of the agreement clearly shows this. The particular spring is referred to and located. The evidence shows very clearly where the spring is and what its water was and where it came from. The water did not bubble up out of the ground, but flowed laterally out of a crevice in a rock, which was on the westerly side of the place dug out for the spring, about fifteen inches below the surface of the ground. There was solid rock at the bottom of the spring and water could not come up through that, and could come into the excavation made by the plaintiff only laterally. The finding of the trial judge, supported at least by some evidence, is "that the said spring is composed of the water which flowed out from the hillsides from the said aperture in said rock, and that the water thus flowing from the opening in the rock constituted said spring;" and there is no evidence that at the date of the agreement the spring was composed of any water but that coming from the crevice in the rock..

What is a spring? Properly, it is the water issuing by natural forces out of the earth at a particular place. It is not a mere place or hole in the ground, nor is it all the water that can be gathered or caused to flow at a particular place. A well is not necessarily a spring, nor is water which, by the expenditure of labor, can be gathered into a reservoir. The plaintiff had no right to dig into the earth and thus get water from other springs in which he had no right, although he took such water to the place where he had the right to get his water. His water came from the crevice in the rock where it had flowed for ages, and where it would continue to flow but for some change in the surrounding circumstances — change inci-

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dent to some disturbance of the earth's surface, or the denudation of forests.

At the time of the agreement about the spring in 1852, there was another spring called spring "C," upon defendant's farm about thirteen feet distant from the former spring. That spring owned by the defendant, he had the right to utilize, and the plaintiff had no right to take or draw the water therefrom. The evidence shows and the finding is that in 1852, and ever afterward, the water issued out of the earth at that place, and flowed away upon the surface of the ground. There is no conclusive or uncontradicted evidence that in digging out the earth for that spring, the defendant diverted or interfered with what, for brevity, we may call plaintiff's spring. On the contrary, the defendant testified: "The putting a barrel into that spring ('C') did not have anything to do with the Furner spring. It did not lessen the water in the pipe at that spring.

* * * The effect of Mr. Furner's lowering his spring was to cut off the water from my spring. The effect of digging my spring was not to draw the water from his spring into it. The water that comes into his spring is right out from under a rock. It is a kind of surface spring in his spring, and the vein of water that feeds my spring runs lower in the ground, boils right up from the bottom of the spring, and where he dug down he struck that vein and cut it off and then put in his box and packed clay around it and held it there." There were some circumstances which confirmed this evidence, and the trial judge had the right to believe it.

There is a reasonable and probable explanation for the diminished quantity of water in plaintiff's spring in the gradual denudation of the forests surrounding the spring and thus letting in the rays of the sun to dissipate the sources of the supply.

The principles of law applicable to this case are not obscure or difficult. The defendant had no right to interfere with the plaintiff's spring to his detriment, no right to deprive him of the water granted in the agreement of 1852, and this upon the facts found and the evidence appearing in the case he did not

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do. The plaintiff had no right to dig down into the earth and drain the water from spring "C." He had no right to dig lower than was necessary to conveniently take the water from his spring, to wit: the water flowing from the crevice in the rock. In digging lower in the defendant's soil, he became a trespasser and the defendant had the right to fill in the excavation thus made.

The facts not only are against the plaintiff, but the authorities cited by his learned counsel do not aid him. He seems to place much reliance on these: *Johnstown Cheese Manufacturing Co. v. Veghte* (69 N. Y. 16) and *Huntington v. Asher* (96 id. 604). In the former case the defendant conveyed by warranty deed to plaintiff certain premises upon which was situated a cheese factory, "during the time it shall be used * * * for manufacturing cheese therein," also the use of the water for the purpose of such manufacture, as then conducted from springs on other lands of defendant not conveyed, with the right to enter thereon to construct and repair the pipes for conducting the water, and the right, in case the water from the springs should prove insufficient for the business at the factory, to go upon such lands to dig other springs and conduct other water courses to the factory. Defendant reserved the right to use water in a specified way and for a specified purpose, but it was provided that he should not use it so as to unnecessarily interfere with the use of the water at the factory. After the conveyance defendant unnecessarily made excavations and constructions upon his lands which had the effect to materially diminish the supply of water from the spring and to interrupt the business of the factory, which acts were persisted in after their effect had become apparent. The action was to recover damages and to restrain defendant from diverting the water, and it was held that defendant's acts were in derogation of his grant; that he was precluded thereby from doing any act on his land which should divert or diminish the supply of water flowing at the time of the grant from the spring to the factory, and that it was immaterial whether the supply was diminished by interference with

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known water courses or by excavations which withdrew water from the spring by percolation or prevented its reaching the spring. There the whole of the land retained by the grantor was made servient to the grantee's water supply. Here a right in a particular spring only was granted. There the acts of the grantor were in derogation of this grant, interfered with the very right granted. Here the grantor disclaims any right or intent to interfere with the right granted, and the findings and the evidence show that he did not interfere with it, and that his acts were not in derogation of his grant. The two cases are radically different.

In the case of *Huntington v. Asher* the familiar principle of law that the grant of an easement carries with it whatever is essential to its enjoyment was applied to the facts of that case. Here the plaintiff had the right to enter upon the defendant's land and repair his pipe, and to dig out and keep in repair his spring so that he could conveniently and usefully take the water therefrom. But he had no right to dig more than was necessary for that purpose, and certainly not for the purpose of taking water not belonging to the spring granted.

An authority more nearly touching this case is *Bliss v. Greckley* (45 N. Y. 671), where it was held that a limited and specific grant of the right to dig and stone up a certain spring and conduct the water therefrom through the grantor's land by a specified pipe to the grantee's house, with covenants of warranty, did not render the entire premises servient to the easement, and that the grantor might in such a case lawfully sink another spring but twenty-seven feet distant, although the effect was to render the first one useless.

Further discussion is not necessary. The facts, as we are bound to take them, are adverse to the plaintiff, and the law applied to those facts justify the judgment rendered at the Special Term.

The order of the General Term should, therefore, be reversed and the judgment of the Special Term affirmed, with costs.

All concur, except MAYNARD, J., not voting.

Order reversed and judgment affirmed.

Statement of case.

C. GRAY BOLTON et al., Appellants, v. WILLIAM SCHRIEVER et al., Respondents.

135	65
3146	331
185	65
159	106

A surrogate before admitting to probate the will of one who was at his death an inhabitant of the state, and died seized of property therein, and issuing letters testamentary thereon, has power and is bound to inquire and to decide as to whether the testator was an inhabitant of the county at the time of his death, and if that officer decides that he was, upon evidence legally tending to support his decision, this decision may not in the absence of fraud or collusion be questioned collaterally.

185	65
j172	1564

Where, therefore, prior to the passage of the acts providing in substance that the jurisdiction of a surrogate, in the cases specified, when the necessary parties were duly cited or appeared shall not in the absence of fraud be questioned collaterally (Chap. 859, Laws of 1870; Code Civ. Pro. § 2473), a resident of the state died seized of real estate in the county of New York, and upon petition of the executor named in his will, which alleged that the decedent was at or immediately preceding his death an inhabitant of the county, the will was by decree of the surrogate thereof admitted to probate and letters testamentary issued thereon, after a hearing and judicial investigation, at which hearing the heirs at law who were infants appeared by guardian, *held*, that the decree was in effect a decision, that the decedent was, at the time of his death, an inhabitant of said county; and that this could not be questioned in an action of ejectment brought by the heirs.

It seems that if no contest had been made, and no evidence given on the subject of inhabitancy except the sworn allegation in the petition the surrogate could have relied upon the fact so stated, and his decision would be regarded as conclusive, subject only to attack by a direct proceeding to review it.

Bolton v. Jacks (6 Robt. 166), overruled.

When the defeated party in an action of ejectment takes a new trial as authorized by the Code of Civil Procedure (§ 1525), paying the costs including an extra allowance, this does not prevent the granting another extra allowance against him in case of his defeat upon the second trial.

(Argued May 6, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 7, 1891, which affirmed a judgment in favor of defendants, entered upon a verdict directed by the court and also affirmed an order directing an extra allowance.

Statement of case.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward C. Perkins for appellants. The probate of the supposed will of Dr. Talmadge was void, and as there was no other evidence of the existence of a will, the plaintiffs, as his heirs, have title to the premises in question. (*Bolton v. Jacks*, 6 Robt. 192; *Roderigas v. E. R. S. Bank*, 63 N. Y. 460; *Laws of 1837*, chap. 350, § 1; *Jochumsen v. S. S. Bank*, 3 Allen, 87; *Thomas v. People*, 107 Ill. 517; *Devlin v. Commonwealth*, 101 Penn. St. 213; *Lancaster v. W. L. I. Co.*, 62 Mo. 12; *Lavin v. E. Bank*, 18 Blatchf. 5; *Melia v. Simmons*, 45 Wis. 334; Redf. on Surr. 48, 49 n. 1; *Jochumsen v. S. Bank*, 3 All. 87; *Holyoke v. Haskins*, 5 Pick. 20; 9 id. 259; *Duncan v. Stewart*, 21 Ala. [N. S.] 408; *Morgan v. Dodge*, 44 N. H. 259; *Cutts v. Haskins*, 9 Mass. 547; *Griffith v. Frazier*, 8 Cr. 9; *Thompson v. Whitman*, 8 Wall. 460.) The probate is void because it appears that the surrogate had no evidence before him as to inhabitancy, and did not adjudicate upon the question. (*Roosevelt v. Kellogg*, 20 Johns. 208; *In re Wrigley*, 8 Wend. 134, 140; *Frost v. Brisbin*, 19 id. 11; *Kennedy v. Ryal*, 67 N. Y. 386; *Bell v. Pierce*, 51 id. 17.) Adverse possession was not made out. (Code Civ. Pro. § 414, subd. 4; *Howell v. Leavitt*, 95 N. Y. 618.) Respondents were not entitled to an extra allowance. (*Flynn v. E. L. Ins. Co.*, 18 Hun, 212; *Bank of Mobile v. P. Ins. Co.*, 8 Civ. Pro. Rep. 212; *Brewer v. Penniman*, 72 N. Y. 603; 11 Hun, 147; *McDonald v. Mallory*, 14 J. & S. 62; *Adams v. Nellis*, 59 How. Pr. 385.)

Edward W. S. Johnston for respondents. The decree of the surrogate admitting this will to probate cannot be attacked collaterally in this proceeding. (*Monnell v. Dennison*, 8 Abb. Pr. 401; *Bolton v. Brewster*, 37 Barb. 389; *Bumstead v. Read*, 31 id. 661; *People v. Judges, etc.*, 20 Wend. 656; *Anderson v. Anderson*, 112 N. Y. 104; *Roderigas v. E. R. S. Inst.*, 63 id. 466; *In re Hammersly*, 9 Civ. Pro. Rep.

Statement of case.

293; Code Civ. Pro. § 2627; *In re Kellum*, 50 N. Y. 298; *McCarthy v. Marsh*, 5 id. 263; *Porter v. Purdy*, 29 id. 106; *People v. Waldron*, 51 How. Pr. 221; *Lewis v. Dutton*, 8 id. 103; *Kinnier v. Kinnier*, 45 N. Y. 535; *Fisher v. Bassett*, 9 Leigh. 119; *Andrews v. Avery*, 4 Gratt. 229; *Abbott v. Coburn*, 28 Vt. 667; *Burdett v. Silsbee*, 15 Tex. 615; *Guilford v. Love*, 49 id. 715; *Johnson v. Beazley*, 65 Mo. 264; *Dequindie v. Williams*, 31 Ind. 444; *Irwin v. Lowry*, 7 How. [U. S.] 180; *Shroger v. Richmond*, 16 Ohio St. 445; *Rigney v. Coles*, 6 Bosw. 479; *Courseins Case*, 3 Gr. Ch. 408; *Smith v. Hilton*, 50 Hun, 237; *Nelson v. Yates*, 37 id. 55; *Home v. Rochester*, 62 N. H. 348; *Devlin v. Commonwealth*, 102 Penn. St. 277; *Emerson v. Ross*, 17 Fla. 122, 127; *Price v. Winter*, 15 id. 66, 69; *Comstock v. Crawford*, 3 Wall. 403; *Brockenborough v. Melton*, 55 Tex. 493; *Arnold v. Arnold*, 62 Ga. 627; *Taut v. Wigfall*, 65 id. 412; *Irwin v. Scriber*, 18 Cal. 499; *Quidort v. Feigeaux*, 18 N. J. Eq. 472; *Galpin v. Page*, 18 Wall. 350, 365.) All disputed questions of fact having the support of any evidence in their favor are to be deemed found in favor of the defendants upon this appeal. A wrong reason assigned by the judge for the direction of a verdict is of no moment. (*Sutter v. Vanderveer*, 122 N. Y. 652.) Tallmadge was at his death an inhabitant of the county of New York. (*Ferguson v. Crawford*, 86 N. Y. 610; *Morrell v. Dennison*, 17 How. Pr. 424; *Duprey v. Wurtz*, 53 N. Y. 556; *Isham v. Gibbons*, 1 Bradf. 69; *Graham v. Pub. Admr.* 4 id. 127; *Crawford v. Wilson*, Id. 504; *Lee v. Stanley*, 9 How. Pr. 372; *Lauderdale Peerage Case*, 17 Abb. [N. C.] 439; *People v. Platt*, 50 Hun, 454.) It is not necessary for the defendant to prove actual possession of the land in question in any of the intermediate grantors from whom she derives title after having proved the actual possession under a paper claim of title in the trustees of Esther Nelson in 1853. (*Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Doolittle v. Tice*, 41 Barb. 181; *Frigate v. Pierce*, 49 Mo. 441; *Tourtellotte v. Pearce*, 42 id. 915; *Carleton v.*

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Mayor, etc., 113 N. Y. 284; *Foulke v. Bond*, 12 Vroom. 527; *Blanchard v. Moulton*, 63 Me. 434; *Lane v. Gould*, 10 Barb. 254; *Sherman v. Kane*, 86 N. Y. 65; *Robinson v. Phillips*, 56 id. 634; *Acker v. Acker*, 81 id. 143; *Clarke v. Gibbons*, 83 id. 107; *Smith v. Long*, 12 Abb. [N. C.] 114.) James Clinton Bolton, who was the plaintiff at the time of the trial, had no standing in court, and whatever remedy the plaintiff had was in partition and not in ejectment. (*Paschal v. Acklin*, 27 Tex. 174; *Graham v. Whitely*, 2 Dutch. 254.) The court having granted an extra allowance and the General Term having affirmed the order granting the allowance, this court has no jurisdiction to pass upon this question except in a case where the allowance exceeds the amount permitted by the statute. (*Shiels v. Wortmann*, 126 N. Y. 650; Code Civ. Pro. § 1525; *Steam Co. v. D. M. Co.*, 61 Hun, 336.)

PECKHAM, J. This is an action of ejectment to recover possession of a lot of land on Tenth avenue, between 33d and 34th streets, in the city of New York. The land belonged at the time of his death to one Theodore B. Talmadge, who died in January, 1841. Mr. Talmadge is the common source of title, the plaintiffs claiming as his heirs at law, while the defendants claim, through his will, which in May, 1841, was proved before the surrogate of the county of New York, and letters granted to the executor named therein. It is claimed by plaintiffs that Mr. Talmadge died in the county of Columbia, and that at the time of his death he was not an inhabitant of New York county, and the surrogate of that county had no jurisdiction to take proof of the will or to grant letters testamentary thereon, and as there was no other proof of the execution of the will the defendants made out no title to the land and the plaintiffs were entitled to recover it as heirs at law of Talmadge.

There was a hearing before the New York surrogate and a judicial investigation, and the result was the judgment or decree admitting the will to probate. The infant daughters of the testator appeared on this investigation by guardian

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appointed by the surrogate. This judgment, now over fifty years old, is assailed by the plaintiffs, and if it can be successfully attacked in this collateral manner it may follow that the defendants, by reason of this great lapse of time, will have no means of proving the will and thus will have no defense to interpose to the plaintiffs' claim, although they have relied upon the sufficiency of a judgment over half a century old decreeing that the will of Mr. Talmadge was properly proved, and under which their mediate grantor (Mr. Talmadge's executor) had power to convey the land in dispute.

The petition of the executor named in the will to the surrogate of New York, alleged that the deceased was at or immediately previous to his death, an inhabitant of the county of New York, by means of which the proving of the will belonged to such surrogate.

The surrogate, in admitting the will to probate and issuing letters testamentary to the executor, in effect decided the fact of inhabitancy, for it was a fact necessary for the surrogate to decide before admitting the will to probate or granting letters, and his decision of that fact, based upon evidence having a legal tendency to support it, ought, it would seem, on general principles, to stand until reversed or set aside, even though it were erroneous.

Much of the general importance which might otherwise attach to the decision of this question is taken from it by reason of legislation upon the subject. In 1870 an act was passed which applied to judgments of surrogates' courts in New York county, and in 1880 a similar act was passed in regard to those courts in all the other counties of the state. (Chap. 359 of the Laws of 1870; Code Civ. Pro. § 2475.) These acts provided in substance that the objection to the jurisdiction of such judgments should not be taken collaterally.

We are of opinion that in a case like the present the same rule obtains, which has been authoritatively declared as to future cases by the statutes cited. Under these circumstances we do not feel called upon to enter into any detailed and extended discussion of the grounds for our decision. It is

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unnecessary to go as far, in order to uphold the decision of the courts below, as the court went in the decision of the first *Roderigas* case (63 N. Y. 460). This case differs from that in the main and important fact that there was here an estate of a deceased person to administer upon. Mr. Talmadge died in the state of New York and at the time of his death he was an inhabitant thereof. In the *Roderigas* case letters were issued to an administrator upon the estate of a living man, but who was in effect declared by the judgment to be dead.

We think that where the individual died an inhabitant of the state by reason of which there was in fact an estate to be administered upon, and the only question is which of the Surrogate's Courts in the counties of the state should act, there is in that case jurisdiction in one of these counties over the subject-matter, that is, over the administering upon the estate of a deceased person dying an inhabitant of the state, and which surrogate is to exercise such jurisdiction depends upon the fact as to which county deceased was an inhabitant of at the time of his death. The decision of such question where evidence is given, and upon a hearing of the parties, ought to be and, we think, is conclusive upon any collateral attack. Under our statute as to proof of wills, although it does not in terms provide that the petition shall state, or that the surrogate shall inquire and decide as to the fact of inhabitancy, yet we think the fair implication arising from a perusal of the whole statute upon the subject, is that the surrogate has power and is bound before admitting the will to probate or issuing letters to institute the inquiry and to decide upon the fact of inhabitancy. (Laws of 1837, chap. 460, §§ 4, 5, etc.)

As the surrogate is directed to inquire as to the names and places of residence of the *heirs* of the *testator*, the implication is a necessity that he must first inquire whether there was a testator. Within the meaning of this statute, there could be no testator if there were no deceased person, neither could there be any heirs of one who was then alive. The surrogate is to take proof of these facts where the testator died an inhabitant. (§ 1 of above cited act.) He must, therefore, as

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part of his statutory duty, inquire as to that fact of inhabitancy before taking the proof of the will.

Another statute authorizes the surrogate to issue subpoenas and take testimony in all matters material to any inquiry pending in his court. (2 Rev. S. 221, § 6.) The duty to investigate and decide upon the fact of inhabitancy is necessarily and naturally to be implied from the whole provisions of the statute relating to wills and their probate and such duty is to be performed before the will is admitted or letters issued. If no contest is made and there is no evidence upon the subject of the inhabitancy of the testator one way or the other, except the sworn allegation in the petition, I do not see why the surrogate may not rely upon the fact so stated. Whether, when the fact thus appears in the sworn petition addressed to the surrogate, such fact shall be resworn to by the petitioner or some one else upon an oath administered by the surrogate himself is matter which, as it seems to us, is not of a jurisdictional nature. The surrogate may regard the oath taken to the petition as sufficient *prima facie* evidence, although the statute does not in terms require the fact of inhabitancy to be stated in the petition. If it be so stated and sworn to and no evidence is offered on the other side and no issue raised as to the truth of the allegation in any manner or form, the decision of the surrogate should be regarded as conclusive, subject only to attack by a direct proceeding to review it. It might happen that where there is evidence *pro* and *con*, the decision would appear to be erroneous, and for that reason it ought to be reversed, but unless a direct attack be made upon it, the judgment should remain. This is upon the principle that the surrogate must decide upon some evidence the fact of inhabitancy before he can go further, and when he does so decide, although erroneously, the decision must stand until reversed.

The nature of a judgment which admits a will to probate is somewhat similar to that of one *in rem*. The *res* which the court takes into its hands for purposes of administration as representative of the state, is the property which was once

possessed and owned by the deceased, who died an inhabitant of the state. Civilized states have for generations past recognized their obligations to specially protect that kind of property. That obligation arises the moment the death occurs. The obligation assumed has been not only that of protection of the property, but also that of the distribution thereof to those who are living and who come within the rules of law governing the subject. How great the right of testamentary disposition should be and under what rules and regulations it should be permitted, are questions which have been differently decided by different nations and by the same nations at different times. Such rights are matters of municipal regulation. The right to inherit from, or to receive by gift, under the will of a deceased person is recognized and protected by the state, and from the fact of such recognition and protection the state owes the duty to see to it that the estate of a deceased person shall pass in accordance with the law which obtains in the state when the death occurs.

To prevent contention and to achieve a peaceful distribution of the estate under the rules of law, and to protect the rights of the creditors of the deceased, all civilized states have created tribunals of a judicial nature, whose function and duty it is to represent and exercise the powers of the state in the course of administration, and whose judgments determine the rights of the respective parties interested in the property as such rights are made to appear. The general jurisdiction over matters of this nature belongs to the state itself by reason of its general sovereignty. The practical exercise of the jurisdiction is vested in the so-called Courts of Probate or Surrogates' Courts.

In construing the language of the statute creating such courts, the fact must continually be borne in mind that the state is creating a tribunal or tribunals for the purpose of fulfilling its general obligations to all its inhabitants to protect and distribute, according to law, that which was once the property of one of their own number. That obligation is as broad as the sovereignty of the state itself. In the organiza-

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tion of the tribunals which are to exercise this jurisdiction, although the language of the statute may create a separate and distinct tribunal for each county in the state, and upon certain facts grant jurisdiction to one of them to the exclusion of all others, yet the facts upon which the jurisdiction is given to the court of one county instead of to another are merely incidental, partaking somewhat of the character of matters of procedure, the main fact being the actual death of an individual who, at the time of his death, was an inhabitant of the state. That is the jurisdictional fact, upon the existence of which is founded the duty of the state to protect and distribute the property according to law. Whether one or the other of the Surrogates' Courts in the various counties shall administer upon the estate, and thus fulfill the obligation which lies with the state itself, is a question which the legislature has provided for, and it depends, among other things, upon the fact of inhabitancy. This fact the surrogate to whom the matter is presented must decide, and if he decide that it exists, and upon evidence which legally tends to support his decision, under such circumstances, we think, it ought to stand until reversed. This is believed to be the general rule. It is a matter of very trifling importance, except upon the mere question of convenience, which of such Surrogates' Courts shall take the proof as to the due execution of the will, and grant letters testamentary thereon. For the purpose of the orderly administration of the estates of deceased persons who died inhabitants of our state, the legislature has provided certain rules governing the subject, and has also provided certain conditions upon which the power of a surrogate to take jurisdiction of the matter depends; the subject-matter, however, of the jurisdiction is the administration of the estates of deceased persons, and over this subject-matter the state has granted to the surrogate of each county general jurisdiction. It is to be exercised upon various conditions, as was said by CHURCH, Ch. J., in the second *Roderigas* case (76 N. Y. 316), dependent upon residence and the like, and the decision of the

surrogate of one county, after a hearing of the parties upon the question whether the case calling for the exercise of the jurisdiction of his court, or the Surrogate's Court of some other county, exists or not, should be conclusive in all collateral proceedings. The jurisdiction to administer is bestowed upon each surrogate to the exclusion of all others, where the facts exist which are named in the statute. It is granted to him, however, out of the general and complete jurisdiction resting with the state over the entire subject of administration upon the estates of deceased inhabitants, and that general jurisdiction has been exercised by the state in the creation of a tribunal in each county for such purpose of administration, and when the question of jurisdiction arises before one of such courts where the deceased died an inhabitant of the state, and the right of administration attaches to the Surrogate's Court of some county, it must, in the nature of things, be decided by the surrogate before whom it comes, and being matter incidental only in its nature, the decision of the surrogate, founded upon some evidence, must be conclusive, even though erroneous, except upon a direct review. I am aware that much has been written by the courts of the various states upon these questions of jurisdiction of courts of probate and the conclusiveness of their judgments. Decisions both ways have been reached. Criticisms have also been made in regard to the decision of the first *Roderigas* case. It is not needful to refer to them, or to again renew the discussion which, as to this state, was ended by the decision in that case. The question is alluded to and the various cases cited in the first volume of the "Treatise on the American Law of Administration," by I. G. Woerner (§ 208 *et seq.*, and notes).

There is in the nature of things a broad distinction between the case of the granting of letters of administration upon the estate of one not in fact dead, and the granting of letters upon the estate of one who was, at the time of his death, an inhabitant of the state, but not of the county where the will was proved, although the surrogate upon some evidence erroneously decided that he was.

It is quite unnecessary and wholly unprofitable to enlarge upon it here.

We do not intend by this decision to attack the principle or to shake the authority of the first *Roderigas* case (63 N. Y. *supra*), for we simply say it is not necessary to here go so far as that case goes. In the opinions delivered in the two *Roderigas* cases will be found much of the learning on this subject, and a citation to most of the decided cases then reported and bearing upon the question.

In this record we think it appears that there was evidence enough to call upon the surrogate of New York to decide upon the question of the inhabitancy of Mr. Talmadge, and the surrogate, by admitting the will to probate and issuing letters testamentary, did in fact decide that Mr. Talmadge was, at the time of his death, an inhabitant of New York county, and this conclusion must, in such an attack as this, be a bar to a reopening of that question. This view of the main issue involved in this case calls for the affirmance of the judgment.

In *Bolton v. Jacks* (6 Robt. 166) a contrary result was arrived at by the Superior Court of New York in a very elaborate and learned opinion. With many of the views therein expressed as to the right to question a judgment rendered without jurisdiction we entirely concur, but for the reasons above given we think they are inapplicable to the particular facts of this case.

Upon this appeal the plaintiffs seek to review the order granting an extra allowance of costs to the defendant. The ground of the appeal is that a new trial herein was taken by plaintiffs under the section of the Code (§ 1525) granting such right as, of course, upon payment of costs, and that, included in the costs which plaintiffs paid when availing themselves of the right to a new trial, was the amount of an extra allowance granted by the court after the former trial. The plaintiffs contend that but one extra allowance can be collected in the same action. This precise question has already been determined adversely to the plaintiffs' view in the case of *Wing v. De La Rionda* (131 N. Y. 422).

Statement of case.

We have considered the other questions raised by the appellants, but we do not think that any error prejudicial to them appears in the record.

The whole judgment should be affirmed, with costs.

All concur, except GRAY, J., taking no part.

Judgment affirmed.

185 76
161 84

THE PEOPLE ex rel. HORACE M. LOWER, Respondent, v.
TIMOTHY J. DONOVAN, Inspector, etc., Appellant.

A judge, at chambers, has no jurisdiction, either in the city of New York or elsewhere in the state, to issue a writ of mandamus.

Even if the application for the writ is a motion within the Code of Civil Procedure (§ 768), it is taken out of the operation of the provision (§ 770) declaring that in the first judicial district a motion which elsewhere must be made in court may be made to a judge out of court, by the provision (§ 2068) declaring that the writ can only be granted at Special Term, save in the cases where it is directed to be granted at General Term (§ 2069).

Where, therefore, on the day of a general election one of the justices of the Supreme Court, upon application made to him at chambers, issued a peremptory writ of mandamus commanding inspectors of election to permit the relator to take the disability oath provided in the election law, and upon taking the oath to retire with a person of his selection to a booth for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared, and where, upon due proof of service of the writ upon the inspectors, and their refusal to obey it, an order was made adjudging one of them guilty of contempt, and imposing upon him a punishment therefor. *Held*, that the justice had no jurisdiction to issue the writ; and so, that disobedience thereto could not be punished as a contempt.

It seems that, as under the statutes of this state (§ 5, tit. 1, chap. 130, Laws of 1842, as amended by § 2, chap. 240, Laws of 1847), no court can be opened within it on election day, except to receive a verdict or discharge a jury, or for the exercise by a single magistrate of certain jurisdiction in criminal cases, a voter who is refused the right to vote can resort to no court for relief until after his right is lost.

People ex rel. v. Donovan (63 Hun, 512), reversed.

(Argued May 23, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 12,

Statement of case.

1892, which affirmed an order of Special Term convicting the defendant of contempt.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Henry Grasse for appellant. There can be no contempt found for disobedience of a writ of mandamus unless it is shown to have been properly served upon the person alleged to be in contempt. (*People ex rel. v. Fisk*, 1 Hun, 467; Code Civ. Pro. § 2071.) The copy of the affidavit and order to show cause which were the only papers served on Donovan, on election day relating to this matter, were defective and misleading and not true copies. (*People v. S. & L. T. Co.*, 47 Hun, 543.) No order having been made in this matter by the Supreme Court, at a Special Term thereof, the writ was not a lawful mandate of the court; and disobedience of it cannot be punished. (*People v. Gilmore*, 26 Hun, 1.) The writ of mandamus in this case was unlawful because it was issued on a public holiday, *i. e.*, the general election day the 3d of November, 1891. (Laws of 1887, chap. 287, § 1.) The service of the order to show cause as well as of the writ of mandamus on the third of November, a general election day, was a nullity. (Laws of 1872, chap. 675, § 13.) There is no power in the court or a justice of the Supreme Court to grant or issue a mandamus on any day on which a general election is held in the state. (Laws of 1842, chap. 130, § 5; *Redfield v. Florence*, 2 E. D. Smith, 340; Laws of 1890, chap. 262, § 25.)

David Leventritt and *Charles H. Knox* for respondent. The appellant was clearly guilty of "willful disobedience to its (the court's) lawful mandate." (Code Civ. Pro. § 8, subd. 3.) The punishment (\$250 and ten days' imprisonment) was within the discretion allowed by the Code. (Code Civ. Pro. § 9.) The judge had power to grant the writ. (*People v. Kearney*, 47 Hun, 133, 134; *People v. Suprs.*, 50 id. 105; *Nichols v. Kelsey*, 13 Civ. Pro. Rep. 154; *Fries*

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v. *Coar*, 13 id. 152 ; Laws of 1842, chap. 130 ; Laws of 1847, chap. 240 ; Code Civ. Pro. § 770.)

ANDREWS, J. On the 3d day of November, 1891, the day of the general election in this state, the Honorable A. R. Lawrence, one of the justices of the Supreme Court, upon application made to him at his chambers in the city of New York, in behalf of the relator, a duly qualified elector of the 7th election district of the 2d Assembly district of that city, made an order requiring the inspectors in that election district to show cause before him at the court house in said city at 3 o'clock P. M., of that day, why a writ of peremptory mandamus should not be issued commanding and requiring them to permit the relator to take the disability oath provided in the election law, and upon taking the oath to permit him to retire with a person of his selection to one of the booths and compartments provided in said election district, for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared. The affidavit upon which the application was made set out certain facts which in the opinion of the learned justice entitled the relator to this relief. The order to show cause was served on Donovan and the other inspectors within the time limited by the order, but they did not appear on its return, and thereupon due proof of the service of the order having been made, and of other facts, the justice issued a peremptory writ following the order to show cause and commanding the inspectors to do and permit the things therein stated. The peremptory writ was served on the inspectors before the closing of the poll and there is evidence tending to show that they refused to obey it. Subsequently application was made to the court at Special Term to punish the inspectors for contempt in disobeying the writ and the proceedings resulted in an order adjudging the defendant Donovan guilty of contempt and imposing upon him a fine of \$250, and ten days' imprisonment, as a punishment for his misconduct. The order was affirmed on appeal to the General Term and the present appeal is from the order of affirmance.

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The order made by the Special Term is challenged on the ground that Mr. Justice LAWRENCE sitting at chambers, and not as a court, had no jurisdiction to issue the mandamus for the disobedience of which the order punishing the defendant for contempt was made. If this point is well taken it disposes of the case and the orders of the Special and General Terms must be reversed; for it is a clear proposition that an order made by a court or judge in a proceeding of which the tribunal or officer had no jurisdiction, and which is not merely irregular or erroneous, is not a lawful mandate and disobedience thereto cannot be punished as a contempt. (Code Civ. Pro. § 8; Eng. & Am. Ency. of Law, vol. 3, p. 788, and cases cited.)

The power to issue the writ of mandamus was at common law lodged exclusively in the Court of King's Bench, because of the general superintendence it exercised over all inferior jurisdictions, and unless conferred by statute, could be exercised by no other court in the realm. It was one of the prerogative writs, and if any trace is to be found of an attempt by any other court to exercise the jurisdiction in the absence of a special statute conferring the authority, it was in the nature of a usurpation. (*Awdeley v. Joye*, Poph. 176; 2 Blk. Com. 110; *Moses on Mand.* 16; *People ex rel., etc., v. Green*, 58 N. Y. 296.) The jurisdiction resided in the court and not in the individual judges, and the writ was issued in term and not in vacation. In colonial times the Supreme Court of the colony of New York, by the ordinances of 1699 and 1704, was invested with all the powers of the courts of King's Bench, Common Pleas and Exchequer in England, and by the Revised Statutes (2 R. S. [3d ed.] p. 259, § 1), the Supreme Court of the state was declared to be vested with all the powers and jurisdiction which belonged to the Supreme Court of the colony of New York, with certain exceptions not now material to be noticed. The same statutes regulated proceedings by mandamus, and while they do not expressly limit the power to issue the writ to the Supreme Court, or prohibit its being issued by a judge out of court, they assume that the power inheres alone in this supreme jurisdiction and is to be exercised by

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the court as such. (2 R. S. 608, tit. Writs of Mandamus and Prohibition.)

The statute of 1873 (Chap. 239), has been construed as conferring upon certain other courts the power to issue the writ (*People ex rel. v. Green, supra*), and it may be conceded that the legislature could authorize the writ to be issued by a judge in vacation, although it is difficult to see how such a jurisdiction could be conveniently exercised in view of the fact that the proceeding by mandamus is substantially an action which may involve pleadings, issues, trial and final judgment upon the right, unless the power of the judge acting in chambers and not as a court should be restricted to issuing the writ returnable before the court, as is the procedure in some of the states. The power of the judge to issue the writ involved in the present appeal is placed on section 770 of the Code of Civil Procedure, which declares that "in the first judicial district a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits." The argument is that an application for writ of mandamus is under the Code a motion and that the writ when issued is an order, and that although elsewhere it can only be issued on application to the court, and not by a judge out of court, nevertheless in the first district under the section quoted the motion may be made before, and the writ may be issued by a judge at chambers. It is to be observed that section 770 of the Code of Civil Procedure, is substantially a re-enactment of section 401 of the Code of Procedure. But the former Code expressly excepted mandamus proceedings from its operation (§ 471), and under that Code a judge out of court in the first district had no power in mandamus proceedings other or greater than was possessed by any other judge in any other part of the state. It seems to be clear that under the former Code a judge out of court could not have issued a mandamus, as that power by practice and the general understanding could be exercised only by a court, and could not be exercised by a judge out of court.

It remains to consider whether the Code of Civil Procedure

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has enlarged the power of a judge in the first district so as to enable him to issue a mandamus out of term or when not sitting as a court. Prior to the enactment of the Code of Civil Procedure the writs of habeas corpus, mandamus, prohibition, etc., were regulated by statutes and the practice of the courts. In the Code of Civil Procedure these statutes and the practice thereunder were brought together and codified under the title "special proceedings instituted by state writ," and the writs above enumerated were denominated state writs. The several writs are treated of in separate articles, and the procedure is regulated with great detail. The respective articles define how and when, and by what authority writs to which they severally relate may be issued. The power to issue writs of habeas corpus was for obvious reasons conferred upon both the Supreme Court at Special or General Term, and upon judges out of court, and judicial officers authorized to perform the duties of a judge. (§ 2017.) But the articles relating to writs of mandamus expressly confines the power to issue the writ to a court at Special or General Term. Section 2068 is as follows: "Except where special provision is made therefor in this article a writ of mandamus can be granted only at a special term of the court. In the Supreme Court the Special Term must be one held within the judicial district embracing the county wherein an issue of fact founded upon an alternative writ is triable as prescribed in this article." The following section (2069) prescribes in what cases the writ may or shall be granted at General Term. Section 2069 contains the only provision in the article which permits any tribunal, other than the Special Term, to grant the writ. The right of a judge out of court to grant the writ seems to be necessarily excluded by the language of section 2068, since there is "no other provision in the article" conferring upon a judge out of court the authority. Even if an application for a writ of mandamus is a motion within section 768 of the Code of Civil Procedure, it is taken out of the operation of section 770 by the peremptory and unequivocal language of section 2068. In the article relating to writs of prohibition

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are sections limiting the power to issue those writs to the court at Special or General Term, substantially as in the case of mandamus. It is difficult to suppose that the power to issue the extraordinary writ of prohibition was intended to be vested in a judge out of court, under the language of section 770, and yet this result would follow if the construction placed by the courts below upon the power of a judge to issue a mandamus is correct, the language of the statute in both cases being substantially the same.

We find it impossible to avoid the conclusion that a judge at chambers in the city of New York, or elsewhere within the state, has no jurisdiction to issue a writ of mandamus.

It is true the right of a voter to vote may be lost, unless this power exist. Under the statute, no court can be opened within the state on the day of any general election to transact any business, except for the purpose of receiving a verdict or discharging a jury, and for the exercise by a single magistrate of certain jurisdiction in criminal cases. (§ 5, tit. 1, chap. 130, Laws of 1842, as amended by § 2, chap. 240, Laws of 1847.) The voter who is refused the right to vote can resort to no court for relief until after his right is lost, as no court can entertain his application on election day. If an enlarged jurisdiction in these cases is expedient, the remedy is with the legislature.

Voters outside of New York can have no relief by mandamus issued on the day of election, and we think the voters of that city, under the arrangement of the statutes, are in the same situation.

Our conclusion requires a reversal of the orders of the Special and General Terms.

All concur, except GRAY, J., dissenting.

Orders reversed.

Statement of case.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant, v. THOMAS ALDRIDGE, Respondent.

SAME, Appellant, v. SAME et al., Respondents.

SAME, Appellant, v. SAME, Respondents.

SAME, Appellant, v. SAME, Respondents.

135	83
135	613
135	83
144	84
144	90

135	83
157	580

135	83
160	247

A patent for state lands under navigable waters, granted by the commissioners of the land office, which is not void on its face and so requires evidence *dehors* the instrument to show its invalidity, may only be assailed in a direct proceeding to review the action of the commissioners, or by an action in equity to set aside the patent.

The fact that the owner of land bounded by a navigable river has conveyed to a railroad company for the use of its road a strip of the land along the water front, over which its route runs, does not deprive him of the character of riparian owner, within the meaning of the statute in reference to grants of lands under water, nor does it give to the company that character; although the title granted to the company is a fee, it holds and can only use the land for the purposes of its road.

Neither the provision of the act of 1846 (Chap. 216, Laws of 1846) incorporating the H. R. R. Co. for the purpose of constructing a railroad along the east side of the Hudson river, nor the amendatory act of 1848 (Chap. 80, Laws of 1848) gave the corporation any title to lands belonging to the state, whether above or under the waters of the river; nor did the adopting a course or filing a map as prescribed give any such title. Said acts, at most, gave only an implied license to the company to build along the course selected; the title to lands of the state as well as those of individuals to be subsequently acquired.

The provision of said amendatory act (§ 5) giving to the directors of the company power to adopt a new and altered location for its road as a substitute for the original location, applies only to what is in reality an alteration and substitution; not to that which is a mere addition to the original location.

The H. R. R. Co. pursuant to said act of 1846, duly designated the line of its road, as it passed through the town of Fishkill, and filed the proper certificate thereof in the office of the county clerk; it obtained from owners of lands fronting on the river conveyances of a strip of land along the river over which the route ran, the eastern boundary of which was above high-water mark, thus taking in the river front. The deeds contained reservations of the grantors' rights to all land lying below high-water mark, except such portion as was included in the route as laid out and located. The grantors subsequently conveyed their remaining lands "excepting and reserving" the line of the railroad as then

Statement of case.

in use and occupation by the company. In 1867 the grantees made application to the commissioners of the land office for a grant of land under the river adjacent to the upland, which was opposed by the company; while the application was pending the company, assuming to act under the amendment of 1848, changed the westerly line of the road, as originally laid out over said lands, by carrying said line further west, in no other respect changing the original location. In 1869 the commissioners granted the said application and issued a patent to the applicants "subject to all rights and privileges in and to said premises," which said company had acquired under its charter. In 1873 said commissioners issued a patent to plaintiff, it having succeeded to the rights of the H. R. R. Co. in the strip of land under water included in the new westerly line. In an action of ejectment to recover said strip, *held*, that plaintiff acquired no title thereto either by the alleged alterations, or by said patent; that even if the patents so issued to the defendants were void because they were not the upland proprietors, this could not be urged in this action, as plaintiff could only succeed by showing title in itself.

Also *held*, that the patents so issued to defendants were valid; that neither the provision in said patents making the grants subject to the rights and privileges acquired by plaintiff, nor the provision of the Revised Statutes in reference to grants of land under water (1 R. S. 208, § 67) as amended in 1850 (Chap. 283, Laws of 1850), prohibiting the commissioners from making any grant interfering with the rights of said H. R. R. Co. affected their right to a patent, or the validity of those granted to them; also, that conceding the company had power to alter its course in the manner it assumed to do, this alteration did not affect the rights of the commissioners to make a grant to an upland proprietor of land included in the alteration.

(Argued May 24, 1892; decided October 4, 1892.)

APPEALS from judgments of the General Term of the Supreme Court, in the second judicial department, entered upon orders made December 14, 1891, which affirmed judgments in favor of defendants entered upon decisions of the court on trial at Circuit without a jury.

The nature of these actions and the facts, so far as material, are stated in the opinion.

Robert F. Wilkinson for appellant. Under its amended locations of 1868, and its patent from the state, the plaintiff acquired by legislative grant a good, lawful and exclusive title

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to all the lands embraced therein, which is paramount to the title of the defendant. (Laws of 1846, chap. 216, §§ 4, 10, 13, 15; Laws of 1848, chap. 30, §§ 1, 5; *Gould v. H. R. R. Co.*, 12 Barb. 616.) The patent to the defendant is void and never had any legal force or effect, because Aldridge, the grantee, never was the riparian owner of the lands above high-water mark adjacent to the grant. (Laws of 1850, chap. 283; *Gould on Waters* [2d ed.], § 148; *C. & S. L. R. R. Co. v. Valentine*, 19 Barb. 484; *In re W. S. & B. R. R. Co.*, 29 Hun, 269; *Gould v. H. R. R. Co.*, 6 N. Y. 522; *Kerr v. W. S. Co.*, 18 N. Y. S. R. 63; 53 Hun, 634; *In re State Niagara Reservation*, 37 Hun, 537; *Ives v. Van Auken*, 34 Barb. 566.) Even if the defendant's grant of land under water could be upheld in any respect, which we deny, the state, by its grant of a part of the same lands to the plaintiff, in 1873, revoked *pro tanto* the grant to the defendant. (*Kerr v. W. S. Co.*, 18 N. Y. S. R. 70.)

H. H. Hustis for respondent. This being an action of ejectment, the plaintiff must prove a good title. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 114 N. Y. 423.) The defendant has a perfect title to the land in question. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 114 N. Y. 423.) In the case against Aldridge, Covert and others, the lands sought to be recovered under the grant to the New York Central and Hudson River Railroad Company are lands under water, outside of adjacent uplands, which upland is between the Hudson river and the Hudson River railroad, which adjacent upland the railroad company never has had title to or possession of, and the statute declares such grant shall be void. (Laws of 1850, chap. 283.) The grant from the commissioners of the land office to Aldridge is a valid one for every part of the premises described therein (*K. I. Co. v. Shultz*, 26 N. Y. S. R. 852; *Nichols v. N. Y. & E. R. R. Co.*, 12 N. Y. 131; *Towle v. Remsen*, 70 id. 303.)

PECKHAM, J. The plaintiff has brought these actions to recover the possession of certain lands in the town of Fishkill

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and county of Dutchess, of which it claims to be the owner, and it alleges the defendant wrongfully withholds the same from it. The cases were tried at Poughkeepsie before one of the justices of the Supreme Court without a jury, and the court found that the plaintiff was not the owner of the lands, but that defendant was, and thereupon judgments were entered in favor of the defendant as owner and against the plaintiff for costs. These judgments were upon appeal affirmed by the General Term of the Second Department and from that affirmation the plaintiff has appealed to this court.

The land was, prior to the year 1846, under the waters of the Hudson river and on the east side thereof. The title to one portion of the adjacent upland was at that time in the executors of the will of John Van Vliet, deceased, and the title to the other portion was in one Isaac Brinkerhoff.

The Hudson River Railroad Company was incorporated by virtue of chapter 216 of the Laws of 1846, for the purpose of constructing a railroad along the east side of the Hudson river from New York to Albany. Pursuant to the provisions of law the New York Central Railroad Company and the Hudson River Railroad Company were duly consolidated in 1869, under the name as given in the title of this action and such corporation has succeeded to all the rights, powers and privileges of which the Hudson River Railroad Company was possessed. Pursuant to the provisions of section 4 of the act of 1846, above cited, examinations, surveys and maps were made in order to provide for the most advantageous line for the location of the road, and after such examinations and surveys were made the directors of the company duly designated the line for the road as it passed along through the town of Fishkill in the county of Dutchess, and the proper certificate thereof was duly filed in the office of the clerk of Dutchess county, as provided for by law. The statute provided further that this course so selected and certified should be the line on which the corporation should construct its road. The land in question after the course of the road had been duly selected and adopted, lay outside and

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west of the west line of such course and under the waters of the Hudson river. The railroad company obtained the strip of land along and upon which it finally built its road by a conveyance from the executors of John Van Vliet, deceased, and from Isaac Brinkerhoff and wife, the executors owning the north and Brinkerhoff and wife the south portion of such strip.

By chapter 30 of the Laws of 1848, the legislature amended the act of 1846, and by section 5 of such amendment it gave power to the directors to adopt a new and altered location for the road if at any time they thought it best to adopt one in place and as a substitute for the old location, and a map of the course as altered was to be filed in accordance with the provisions of that section. The railroad company built and operated its road on the land conveyed to it by the executors of Van Vliet and by Brinkerhoff and wife and so continued for about twenty years without alteration or amendment of its line. After the expiration of that time and on the 30th of September, 1868, the company assumed under the amendment of 1848, above cited, to modify its location and alter its line and filed a map thereof as provided by law. The modification and alteration consisted simply in carrying or pushing its original westerly exterior line some distance further to the west. Subsequently and on the 10th of November, 1868, an additional alteration and modification of its westerly line was made by the company and a map thereof filed, by which that line was carried still further to the west. These so-called modifications and alterations of the westerly line of the location, course or route of the railroad would include the land in question, and the plaintiff claims title thereto under the provisions of its charter and amendments and also by virtue of a conveyance from the commissioners of the land office. Prior to this time the title to the lands was in the state.

We think the plaintiff acquired no title to the lands in question by reason of these alleged alterations.

By the original act of 1846 the railroad company was to adopt a certain line, course or way for the railroad, and such

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as the directors should declare most advantageous, and this course so selected, the statute said should be the line on which the road should be built. The state, however, did not in any of the statutes relating to the railroad, convey any land to the company which belonged to the state, either above or under water. The act of 1846 gave no such title. Neither did section one or five of the amendment of 1848. The most that could be urged was perhaps a mere implied license to the company to build along the course selected, even though lands of the state were included therein. This gave no title to the land embraced in such course. The land was to be acquired subsequently.

As to lands belonging to individuals the company secured no title by selecting and adopting a course and filing a map. It still had to purchase such lands or else obtain them by the exercise of the right of eminent domain. There is no provision in the law which makes a different result where the lands belong to the state. Under the general railroad act of 1850, the commissioners of the land office are empowered by section 25 to grant to any railroad company formed under that act any land belonging to the people of the state which may be required for the purpose of the road, upon such terms as may be agreed on by them. And by section 49 of the same act all railroad companies within the state are granted all the powers and privileges contained in the act, so that plaintiff had the right thereunder to apply for a grant of land under water, belonging to the state, if the same were required for the purposes of its road, and upon terms to be agreed on between the company and the commissioners of the land office.

The fifteenth section of the act of 1846, incorporating the railroad company, contemplates the building of a bridge over the Spuyten Duyvel creek by the company, and also bridges over other creeks and navigable streams and inlets, and the act also assumes that the company will cross the bays along the river. But there is no grant by the state of any land under the water of these bays or inlets, and no title is conveyed by any statute that I have seen. The state has permitted the build-

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ing of the road across these waters, and probably through its commissioners of the land office it has granted, in most instances, the title to such lands under water as were used by the company. There is nothing, however, in the statutes themselves which operates as a transfer of the title. When the alterations made under the act of 1848 called for lands belonging to the state, the title thereto was not conveyed by the making of such alterations or by the filing of a map thereof. In addition to this view it would seem that the act of 1848 applies only to what is in reality an alteration, and not to that which is a mere addition to the original location or course. The part added is not a new course, and is in no sense a substitute for the old one, as the statute unquestionably contemplates it should be. There are thus two difficulties with the plaintiff's contention as to the effect of the alleged alteration. The statute, in the first place, does not contemplate a mere addition where there is to be no alteration and substitution. In the next place, if the alteration claimed were within the purview of the statute, the company would thereby be clothed with a power to so locate its route, and the necessity would still remain of acquiring the land contained in the proposed alteration, either by purchase or condemnation, if from private individuals, or by grant if from the state.

It is too clear for more extended argument that the company acquired no title to the lands in question by reason of any assumed modification or alteration of its original course, and the filing of a map indicating such alteration.

The plaintiff, however, does not rely alone upon these alterations. On the 26th of December, 1873, the commissioners of the land office pursuant, as is stated, to section 25 of the General Railroad Act already referred to, granted to the plaintiff all the land under water embraced within the boundaries of its amended locations of 1868.

The plaintiff now claims that by virtue of the locations made by the railroad company in 1868, and of the grant from the commissioners of the land office in 1873, it has acquired title by legislative grant to the land in question and that such

title is paramount to that of the defendant. The decision of this question requires a statement of some additional facts.

The conveyances from the executors of Van Vliet and from Brinkerhoff and wife to the railroad company embraced a strip of land wide enough for its tracks to be laid on, and the eastern boundary of this strip was above high-water mark and ran along the front of the farm as it had been bounded by the river, thus taking in the front of the farm so bounded and thereby as is claimed wholly divesting the grantors of their character of riparian or adjacent owners.

It is through conveyances made by these grantors that the defendant claims title to the farm lands immediately east of the strip of land so granted to the company and it is by reason of such conveyances that the defendant claims to be owner of the adjacent uplands and hence a proper party to receive a grant from the state of the adjoining lands under water.

The deed from the executors to the railroad company contained this declaration: The said parties of the first part, however, hereby reserve to the estate of said John Van Vliet, deceased, and for the benefit thereof, all rights to all land lying below high-water mark of the Hudson river, except such portion as is taken for the use and occupation of said road as laid out and located as aforesaid and as particularly described in said map. The deed from Brinkerhoff and wife contained a similar declaration. Both deeds conveyed the respective lands to the company as a strip of land (using the language of the deed) through the lands and premises of the grantors, "as laid out and located as part of the route of the railroad as then located and more fully shown on the map annexed." The deed from the executors of Van Vliet, dated April 1, 1851, to defendant, was made "subject nevertheless and hereby especially excepting and reserving from the within described lot of land, the line of the Hudson River railroad as now in the use and occupation of the said Hudson River Railroad Company." The deed from Brinkerhoff and wife to defendant, and dated January 2, 1854, contained substantially the same exception. The defendant having thus become the

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owner of the upland farm from which this strip was taken for the purposes of and by the railroad company, made application to the commissioners of the land office and filed his petition to them on the 14th of May, 1867, asking for a grant of land under water adjacent to his upland. This application would seem to have been opposed by the railroad company, and while it was pending before the commissioners, the company, on the 30th of September and the 10th of November, 1868, assumed to make the alterations in its course as already described.

On the 5th of May, 1869, the commissioners of the land office granted the application of the defendant and issued a patent to him for the lands under water which are the same lands embraced in the complaint herein. This patent was made "subject to all rights and privileges in and to said premises, or any part thereof, which the Hudson River Railroad Company may have acquired under its charter."

The patent from the commissioners of the land office to the plaintiff bears date December 26, 1873, more than four years subsequent to that of the defendant. The patent to the defendant being prior in point of time to that granted to plaintiff, would seem to make the title of the defendant the better of the two. The plaintiff answers this by stating that the defendant was not the owner of the adjoining upland, and consequently could not legally obtain a grant of these lands under water. It is further stated that the patent to defendant was granted expressly subject to all rights and privileges in and to the premises, or any part thereof, which the railroad had acquired under its charter. The act (Chapter 283 of the Laws of 1850), while providing for the granting of lands under water to the proprietor of the adjacent upland, also prohibits the commissioners from making any grant to interfere with the rights of the Hudson River Railroad Company. What those rights were must be determined. The simple claim that the patent of the defendant is void because he was not the upland proprietor (even if well founded in fact), could not be urged in this action, which is a purely legal

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one, to obtain possession of real estate on the ground that plaintiff is the owner thereof. There is no fact set up in the complaint calling for the exercise of the equitable powers of the court, and the plaintiff must succeed by showing the better legal title.

It has been frequently held that a patent such as this, which is not void on its face, and which requires evidence *dehors* the instrument to show its invalidity, can only be assailed in a direct proceeding to review the action of the commissioners, or by an action in equity to set aside the patent. (*Blakeslee Co. v. Blakeslee's Sons Iron Works*, 129 N. Y. 155, and cases cited.)

The claim that defendant could not legally obtain a grant of these lands because not the owner of the upland, is thus disposed of, so far as this action is concerned.

We have seen that the plaintiff, by assuming to make the alterations alluded to, acquired no legal title to the land embraced within the limits of the proposed alteration. If it be conceded that the company had power to alter its course in the manner it assumed to do, the alteration did not in any manner affect the power of the commissioners of the land office to make a grant to an upland proprietor of the land under water, although it was included in the proposed alteration. A private owner of land prior to the purchase or condemnation thereof by a railroad would not be precluded from selling it because it was included within the terms of the original or altered location of the road; and the commissioners of the land office would not on that ground be prevented from granting such lands any more than an individual owner. The right is given to the commissioners by section 25 of the Railroad Act of 1850, to grant to the company any land belonging to the people of the state, which may be required for the use of the railroad, on such terms as may be agreed upon by them.

The fact that the lands are included in a proposed alteration of the course of the road may be evidence that they are needed by the company for its use, and when the company makes its application to the commissioners, if the lands still belong to

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the state, the commissioners may grant them on terms to be agreed upon. There is nothing in the statute, however, which in any way affects the power of the commissioners to grant the lands to an upland proprietor after the proposed alteration has been surveyed and mapped, as well as before. If the commissioners have so conveyed, the company must negotiate with their grantee. If they have not conveyed, then the terms upon which the conveyance is to be made must be agreed upon between the commissioners and the company, and there is nothing in the statute from which it is to be inferred that the commissioners are under any obligation to convey for less than the value of the land, or upon any more favorable terms than they would impose upon the owner of the upland.

At the time of the granting of the patent to the defendant there were no rights or privileges, properly so called, vested in the company to which the patent to the defendant was subject. The right to apply to the commissioners for a grant of land belonging to the people was not touched. And the right to prevent the commissioners from granting land under water belonging to the people to the upland proprietor did not exist, and hence was not invaded. It is thus apparent that neither claim of the plaintiff is adequate as an answer to priority of the patent to the defendant.

As the case is here, however, we think it proper to decide the other question before us, whether the defendant at the time he took the grant from the commissioners was an upland owner within the meaning of the statute upon that subject. This point has been fully argued by counsel for the respective parties, and we think it should be met and decided now.

The case of *Rumsey v. Railroad Co.* (114 N. Y. 423) would seem to be nearly decisive of this. It is true there is some difference in the facts. In the *Rumsey* case the railroad was built partly on an embankment and partly on piles through the waters of the river and at some distance from the shore, and the tide ebbcd and flowed in the intervening space. In this case the company received a grant which takes in a strip partly below and partly above high-water mark. This fact

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the plaintiff urges is most material, for it is claimed it is thereby made a riparian owner, and even if it could not itself receive a grant as such (which it does not admit), it prevents the owner of the land adjoining its own from being regarded as a riparian owner, and hence prevents the granting of a patent for lands under water to him. The fact that a small quantity of water intervened between the shore and the railroad was not regarded in the *Rumsey* case as very material. The fact was adverted to as bringing the plaintiff directly within the class of persons indicated by the statute to whom grants of land under water might be made. But the character of the occupation of the land by the railroad company, and whether it fairly could come within the meaning of the statute as an owner of upland to whom a grant of adjacent lands under water could be made, were the two main points discussed in the opinion, and upon which the strength of the reasoning was expended.

It was said that it could not be so regarded, and the reasons given are, we think, quite satisfactory. It is unnecessary to here repeat them. The counsel for the plaintiff does not claim the lands by virtue of its own ownership of the upland, but under a different statute. (General Railroad Act of 1850, §§ 25, 49.) It is said, however, that by the deeds to the company the defendant's grantors destroyed their rights to a grant and put such a grant forever beyond the reach either of themselves or their grantees, and that by virtue of such deeds they vested the company with rights inconsistent with any right to a grant on their part.

We have held that the power conferred by statute upon the commissioners of the land office authorizes them to convey lands under water to the owners of the adjacent uplands, and that those owners, when they conveyed the uplands, could not reserve the right to obtain a grant of the adjoining lands under water. This was because the right or privilege conferred by the statute is regarded as appurtenant to the upland and vests in the owner thereof, and it cannot exist severed from such ownership. (*Blakeslee Co. v. Blakeslee's Sons, etc., Co.*, 129 N. Y. 155.)

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If the defendant's grantors by their deeds to the railroad company ceased to occupy the position of owners of the adjoining upland within the meaning of the statute, it would probably follow that the patent to the defendant was illegal. We do not, however, so regard the effect of these conveyances. The company took the lands for the use of its road and for that only. The deeds conveyed the land for that purpose only. At the time when the strip was conveyed to the company it had determined and located its line and the conveyance simply granted that which was included in such location. The company received and holds such land in fee simple by the voluntary grant of the former owners, and by the provisions of the statute it holds such real estate and can use it only for the purposes expressed in its charter, that of the maintenance, construction and accommodation of the railroad. For this purpose only the land can be used, and although the title granted to the company is a fee, yet as thus burdened and restricted, we think the grantor in conveying the strip did not thereby cease to be the owner of the upland within the meaning of the statute.

The conveyance to the railroad of the strip in question is in its effects entirely unlike the conveyance to a private individual in fee simple. In the latter case it may well be, the grantor even of so narrow a strip would lose his character of riparian owner and the grantee would acquire it. But when we consider the purpose of the conveyance to the railroad and the limitations to its use which the statute itself placed upon the company, it becomes entirely plain that the grantor ought not to lose his character of riparian owner where he retains the property immediately adjoining that which he conveys. (Chap. 216, Laws of 1846, § 9; ch. 30, Laws of 1848, § 9.) Grants of land under water were authorized to be made to the upland proprietor for the purpose of promoting the commerce of the state. A railroad company authorized only to do the business provided by its charter as a railroad, could certainly not within the meaning of the acts, promote the commerce of the state and hence would not

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come within the class of persons named by the acts conferring power to convey lands under water for the purposes named therein. This has been so stated by Judge BROWN in his opinion in the *Rumsey* case and I fully concur therein.

The limitation placed by the statute upon the use of this strip of land by the railroad company, precludes the ordinary consequences from attaching to a conveyance in fee of land. The grantor still remains the owner of the adjoining upland within the meaning of the statute and he or his grantees are the persons to whom a grant of land under water may properly and legally be made. The defendant having received his patent prior to that granted to plaintiff, and the plaintiff then having no rights or privileges to which the defendant's patent was subject, it follows that a defense to this action was established.

Upon a review of the whole case we are persuaded the plaintiff failed to make out any title and that the defendant duly proved that he was himself the owner of the land in controversy. We have looked at all the questions presented and argued by plaintiff's counsel, and we think no error was committed on the trial and the judgment of the General Term should therefore be affirmed, with costs.

All concur.

Judgment affirmed. •

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WALTER V. WILSON, Respondent, v. THE CITY OF TROY,
Appellant.

Interest may legally be allowed by a jury, in its discretion, in estimating the amount of damages sustained by the plaintiff through an injury to his property caused by the negligence of the defendant. The interest may be computed on the amount of the depreciation in value of the property.

The distinction in this respect between actions sounding in tort, and actions to recover unliquidated damages on contract pointed out.

An excavation was made in a street of the city of Troy for the purpose of laying pipe to conduct water from the main laid in the street to a private residence. The owner thereof employed a firm of plumbers to do the work of conducting the water to his house. The city water

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works are the property of the municipality, and under the management and control of a board of water commissioners, who appoint a superintendent of the water works. Said firm applied to that officer for men to dig the trench; he directed men in the employ of the city to do this, they were paid by the city, the firm refunding to the city the amount so paid. The excavation was left without proper guards and lights, and a horse belonging to L., plaintiff's assignor, while being driven along the street at night fell into the opening and was injured. In an action to recover damages it appeared that said board, pursuant to the power conferred upon them by statute (§ 6, chap. 58, Laws of 1855), enacted an ordinance or by-law, prohibiting any one, except the superintendent or person employed by him or the board, from tapping or making any connection with the mains, unless by the permission or under the direction of the superintendent; also that it had been the custom for years before the accident to make application to the superintendent for men to make excavations necessary in connecting with the mains, and that they were furnished as in this case. *Held*, that the by-law did not simply prohibit the connection of lateral pipes with the main by private persons, but also prohibited them from digging the necessary trenches in the streets; and that while, as between the owner of the dwelling and the plumbers, the digging was a part of the work of the latter, as to others it could not be held as matter of law that the men who dug the trench and left it unguarded ceased, for the time being, to be servants of the city, and became the servants of the plumbers; but that the question was one of fact and was properly submitted to the jury; and this having been found against the city that it was properly held liable, although it was not charged with notice, actual or implied, of the negligent act.

Where one is injured by the neglect of a city to properly guard a place in its street, made dangerous by its own act, it is not essential to show notice to it of the defect.

Reported below, 60 Hun, 188.

(Argued May 25, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 10, 1891, which modified and affirmed as modified a judgment in favor of plaintiff, entered upon a verdict.

This was an action by plaintiff as assignee to recover damages for injuries to a horse belonging to one Learned, received by falling into a trench in South street, in the city of Troy, on the night of November 19, 1879, which it was charged was

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dug by defendant's employes, and permitted to remain unguarded.

The facts, so far as material, are stated in the opinion.

William J. Roche for appellant. The charge of the court in effect, that this work was being done under the direction of the city by its officers, and that no other notice of the condition of this street was required to hold the city liable for defects therein arising through the doing of the work, was not correct. (Laws of 1832, chap. 51, § 6; Laws of 1855, chap. 58; Laws of 1880, chap. 30, § 6.) The court erred in instructing the jury that in awarding damages the outside limit was the sum of \$3,000, "and the interest on that sum from the time of the happening of the injury." (*Fitch v. Livingston*, 4 Sandf. 492; *Walrath v. Redfield*, 18 N. Y. 457; *Mygatt v. Wilson*, 45 id. 306; *McCollum v. Seward*, 62 id. 316; *Mercer v. Vose*, 67 id. 56; *Black v. C., etc., Co.*, 45 Barb. 245; *Winch v. M. B. I. Co.*, 86 N. Y. 618; *McMaster v. State*, 108 id. 542; *Reiss v. N. Y. S. Co.*, 35 N. Y. S. R. 86; *Parrott v. K. I. Co.*, 46 N. Y. 361; *Mansfield v. N. Y. C. & H. R. R. Co.*, 114 id. 331; *Sayre v. State*, 123 id. 291.)

Charles E. Patterson for respondent. The liability of the defendant for the injury in question was clearly and fully established. (*Pettingill v. City of Yonkers*, 116 N. Y. 558; *Ehrgott v. Mayor, etc.*, 96 id. 265; *Walsh v. Mayor, etc.*, 107 id. 220; *Barnes v. District of Columbia*, 91 U. S. 540; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Turner v. City of Newburgh*, 109 id. 301; *Nelson v. Vil. of Canistota*, 100 id. 89; *Russell v. Vil. of Canastota*, 98 id. 496.) Error was not committed in including interest in the amount of the verdict given by the jury. (*Walrath v. Redfield*, 18 N. Y. 457-462; *H. Ins. Co. v. P. R. R. Co.*, 11 Hun, 182-188; *Mairs v. M. R. E. Assn.*, 89 N. Y. 498; *Duryea v. Mayor, etc.*, 96 id. 477-499; *Moore v. N. Y. E. R. Co.*, 126 id. 671.) Inasmuch as the amount of the verdict as modified by the

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General Term is less than the uncontradicted evidence shows the plaintiff was entitled to recover, if entitled to recover at all, the judgment should not be set aside because of any errors in the method adopted by the jury to arrive at the result actually reached. (*Minick v. City of Troy*, 83 N. Y. 514· *Field v. Field*, 77 id. 294.)

O'BRIEN, J. The record in this case presents two questions. First, whether the finding of the jury that the damage was the result of the defendant's negligence is sustained by any evidence, and secondly, whether interest could legally be allowed by the jury in estimating the amount of the damages. On the night of the 13th of November, 1879, a valuable horse belonging to one Learned, plaintiff's assignor, while being driven through South street, in the city of Troy, fell into an open ditch or unguarded excavation, made during that day, and was permanently injured. There is little, if any controversy, with respect to the value of the horse, the extent of the injury or the amount of damages. The night was dark and it is not denied that there was evidence for the jury sufficient to sustain a finding of negligence on the part of someone by reason of the failure to protect a place of danger, in a public street, by proper guards and lights. It was not shown that the city had any actual notice of the existence of the excavation, if made by private parties without its permission, and a sufficient period had not elapsed between the time of opening it and the accident, to render the city liable on the ground of implied notice. The excavation was made for the purpose of conducting the water from the principal main in the street, through lateral pipes, into a private house. The owner of the house employed a firm of plumbers to do the work, which included the digging of the trench, as well as laying and connecting the lateral pipes with the main in the street. The firm applied to the superintendent of the water works for men to open the trench in the street, and that officer directed laborers in the employ of the city to do so. The opening in the street was made by them and they were paid for the work

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by the city, the plumbers refunding to it the sum so paid. The question is whether the men who dug the ditch were under the control and direction of the defendant, or subject to the orders of the plumbers engaged in performing a piece of work for the owner of the house. The system of water works in Troy is the property of the municipality and is under the management and control of a board of water commissioners, which may be regarded as a department of the city government. The commissioners are by law required to nominate, and the common council of the city to appoint a superintendent of the water works, who is the executive officer in that department, and who, in this case, directed the men in the employ and pay of the city to make the excavation in the street. The board is authorized by law to extend the distributing pipes of the water works wherever they might think proper, and to make such alterations and improvements in the works, and in the management and preservation thereof, as they might deem necessary and expedient, and to employ such persons and assistants as they might require to execute any of these purposes, which employes were to be paid for their services from the city treasury. The commissioners were also empowered to enact such by-laws, regulations and ordinances as they should deem necessary for the protection of hydrants and water pipes, and the preservation, protection and management of the water works. These by-laws, unless disapproved by a vote of two-thirds of all the members of the common council of the city, were to have all the force and effect of law.

In pursuance of the power thus conferred by the statute, the board of water commissioners enacted by-laws and ordinances on the subject, which were in force at the time the excavation in question was made. They, in effect, prohibited any person, except the superintendent and those employed by him or by the commissioners, to tap or make any connection with the main or distributing pipe, or to permit the same to be done, unless by the permission and under the direction of the superintendent.

The learned counsel for the defendant contends that this

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regulation simply forbids the act of connecting the lateral pipes, from the house, with the main, and did not prohibit private persons from digging the necessary trenches and uncovering the main or distributing pipe, and hence that part of the work was done by the contractors, who were employed by the owner of the house to make the connection, and not by the city. But a private individual had no right to dig in the street for this or any other purpose without the permission of the proper municipal authorities; and the object, as well as the language of the ordinance, indicates that it was intended to prevent the uncovering of the main or any interference with the street, in which it was placed, by private parties. At all events, the water board and its chief executive officer, the superintendent, in the discharge of the duties imposed upon them by the statute, might very properly give to it that construction and act accordingly. To hold that such a by-law did not embrace within its object and purview the evils that might result from unguarded and unregulated interference with the bed of the street, by private parties, in order to reach the main, would be giving to it a construction altogether too narrow. The evidence tends to show that the water board gave to it the broader and more comprehensive meaning, as it was the custom and practice for years before the accident in question to make application to the superintendent for men to do the digging, and they were always furnished, as in this case. As between the owner of the house and the plumbers, employed by her to introduce the water into her house, the digging was undoubtedly a part of the contract or work of the latter. If no main had been placed in the street at that time, they could also have contracted with her to procure its extension, but that part of the work would be subject to the action and regulations of the water board, and while the contractors might be obliged to pay the city for the whole or some part of the expense, it would be none the less the work of the city. One of the plumbers testified that while he agreed with the owner of the house to do all the work, yet he knew then that it was the practice and custom to

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apply to the superintendent of the water works for men to do the digging and to make the connection, and acted upon the assumption that he had no right to do it. He also says that the men who made the excavation were not employed by him but by the city. We think that upon the proof it could not be held as matter of law that the men who dug the trench and left it unguarded ceased for the time being to be the servants of the city and subject to the directions of the superintendent, and became, while doing this job of work, the servants of the party employed to put in the lateral pipes into the house, as is urged by the learned counsel for the defendant. What party sustained the relation of master to the men who dug the trench, and had the control and direction of them, and was charged with the duty of directing them to properly guard the ditch, whether the plumbers, on the one hand, or the city, through the superintendent of the water works on the other, was the important question to be determined, and the trial court submitted it to the jury. Under all the circumstances, the question became one of fact, and this disposition of it was not error. (*Ward v. New England Fibre Co.*, 154 Mass. 420.)

The finding of the jury is conclusive upon us and imports that the city itself, through one of its officers or departments, caused the trench to be dug and left it unguarded, resulting in the damage complained of. In such a case the negligent act is imputable to the city and the doctrine of actual or implied notice has no application, or at least is unnecessary, where one injured by the neglect of the city to properly guard a place made dangerous by its own act, brings the action. (*Pettengill v. City of Yonkers*, 116 N. Y. 558; *Walsh v. Mayor, etc.*, 107 id. 220; *Turner v. City of Newburgh*, 109 id. 301; *Brusso v. City of Buffalo*, 90 id. 679; *Russell v. Village of Canastota*, 98 id. 496; *Nelson v. Village of Canisteo*, 100 id. 89; *Ehrgott v. Mayor, etc.*, 96 id. 273; *Barnes v. Dist. of Columbia*, 91 U. S. 540.)

The amount demanded in the complaint, on account of the injury to the horse, was \$3,000, and the court instructed the

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jury that they could not, in awarding damages, go beyond that sum, with interest. The defendant's counsel excepted to this in so far as it authorized interest and requested the court to charge that the jury could not allow interest in the action. The court declined to so charge and the defendant's counsel excepted. The jury afterwards came into court and announced that they had found a verdict for the plaintiff for \$3,000 and interest. The court then said: "You must compute the interest if you give interest: You will have to render your verdict in dollars and cents." This direction was complied with, and the verdict as entered included interest from the date of the injury which result has been modified by the General Term, by striking out the interest awarded prior to the date of the presentation of the claim to the city, which was held to be a prerequisite to the maintenance of the action. The fair construction of the charge is that the jury could include in the damages interest upon the sum found to represent the diminished value of the horse, in consequence of the injury, and not that the plaintiff was entitled to interest as matter of right. The exception, therefore, presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property, in consequence of the injury, from the time that the cause of action accrued. When interest may be allowed as part of the damages, in actions of this character, is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the courts are not harmonious. It is, perhaps, impossible to formulate a general rule embracing every possible case. The tendency of courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of

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constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions, there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court and principles stated that will furnish a guide in most cases. (*White v. Miller*, 78 N. Y. 393.)

We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass *de bonis asportatis* was given first in England by statute third and fourth William IV. The recovery was not, however, allowed by that statute as matter of right but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases. (*Beals v. Guernsey*, 8 John. 446; *Hyde v. Stone*, 7 Wend. 354; *Bissell v. Hopkins*, 4 Cow. 53; *Rowley v. Gibbs*, 14 John. 385.)

The principle that the right to interest in such cases was in the discretion of the jury was, however, gradually abandoned and now the rule is that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as matter of law. The reason given for the rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value. (*Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Penn. C. R. R. Co.*, 49 id. 315; *Buffalo & H. T. Co. v. Buffalo*, 58 id. 639; *Parrott v. Knickerbocker & N. Y. Ice Co.*, 46 id. 369.) It is difficult to perceive any sound distinction between a case where the defendant converts or

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carries away the plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. (*Thomas v. Weed*, 14 John. 255.)

We think the rule is now settled in this state that where the value of property is diminished by an injury wrongfully inflicted the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. (Sedgwick on Damages [8th ed.], vol. 1, §§ 317, 320; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Manhattan R. E. Assn.*, 89 id. 498; *Duryee v. Mayor, etc.*, 96 id. 477, 499; *Home Ins. Co. v. Penn. R. R. Co.*, 11 Hun, 182, 188; *Moore v. N. Y. E. R. Co.*, 126 N. Y. 671; *P. S. V. R. Co. v. Ziemer*, 124 Penn. St. 560.)

There is a class of actions sounding in tort in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc. And still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous.

Our attention has been called to the case of *Sayre v. State* (123 N. Y. 291), and it is urged, upon the authority of that case, that interest cannot be allowed in any case for the recovery of unliquidated damages arising from negligence. We think that the case, when correctly understood, does not sustain the contention, but in effect holds the contrary. In

that case a party appealed from the decision of the Board of Claims upon an award in his own favor, and the only question was whether, upon the evidence and findings, the claimant had been allowed all the damages that he was entitled to, and this court not only affirmed his right to all the damages that the board had awarded him, but increased the award from \$3,000 to \$8,136. The claim was based upon the negligent act of the state in overflowing the lands of the claimant, from which the damages claimed resulted. The Board of Claims allowed no interest, nor did this court. In adding to the award a sum of over \$5,000 this court acted, in some sense, as a court of original jurisdiction, and in making up the sum which was to constitute the final award it refused to allow an item of interest claimed. Now it is admitted that a court or jury charged with the duty of making up the amount of damages in such cases *may* refuse to allow interest, and that is precisely what this court did and nothing more, and, therefore, the case is in harmony with the rule above stated, and with the cases from which we have deduced it. It is far from holding that it is error when, in such a case, the jury or the original court, after considering all the facts and circumstances bearing upon the loss, allows interest, in the exercise of discretion, as part of the indemnity to which the party is entitled. It simply recognized the rule that interest in such cases was not a matter of right, but of sound discretion, and held that the claimant was fully indemnified for his loss without adding interest. It is true that the learned judge who gave the opinion cited the cases arising upon contract in which it has been held that interest is not allowable, and remarked that he found no case justifying an allowance of interest. That was probably an inadvertence, but the decision refusing interest was right, though the reasons may have been based upon a principle applicable to another class of actions. It must be remembered that the court was not reviewing any question decided below in regard to interest, but seeking to make up for itself a new award from the items of the claim appearing in the record, and whatever was said by way of argument,

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and as the reason for throwing out an item of interest on a sum claimed to have been expended in restoring or reclaiming the land, cannot be considered as the judgment of the court on the question now under consideration. That question was not noticed in the argument, and was not involved in the case except, perhaps, as a matter of discretion. For these reasons the judgment should be affirmed.

All concur, except EARL, Ch. J., FINCH and GRAY, JJ., dissenting.

Judgment affirmed. _____

ANNA B. ANDERSON, Respondent, v. THE SUPREME COUNCIL
OF THE ORDER OF CHOSEN FRIENDS, Appellant.

Defendant issued a certificate of membership to plaintiff's husband insuring his life; the amount to be paid to her upon his death. By the certificate and the constitution and regulations of the order a failure to pay dues and assessments rendered the certificate void. In an action upon the certificate defendant claimed a forfeiture because of failure to pay certain assessments. It appeared that plaintiff paid the assessments in question to the wife of the secretary of the subordinate council, to which her husband belonged, at the residence of said secretary. By defendant's constitution it is made the duty of the secretary of a subordinate council to receive all assessments, and the council may permit him to select an assistant for whose acts he is responsible, and there was no provision requiring assessments to be paid to him in person. It appeared that it had been the common practice for members of the council to pay dues and assessments to the secretary's wife in his absence; he had no office and payments to him or his wife were made at his residence; so far as appeared no question had been raised as to the authority of the wife to receive such payments. *Held*, that the absence of any dissent on the part of the council or its officers justified the conclusion that the uniform practice proved was known to and approved by the council; that the secretary's wife was virtually his assistant in receiving assessments; and so, a finding that the assessments were paid was justified.

Defendant's constitution provides that no claim for any benefit shall be paid, until complete proof of its justness has been made in accordance with its laws and regulations; the subordinate councils are the delegated agencies of the supreme council, and the general scheme as disclosed by the relief fund laws is to impose upon said councils the duty of investigating a death claim and to prepare and forward to the

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supreme council proofs of death according to prescribed forms. Plaintiff proved that shortly after her husband's death she called upon the secretary of the subordinate council and presented to him the physician's certificate of the death, and also called upon the councilor of the lodge and was assured by both "that everything would be all right." *Held*, that no definite duty was imposed upon plaintiff to furnish proofs of death, as in the case of ordinary life insurance; and that she was not required to do more than to notify the officer of the subordinate council of her husband's death as she did.

(Argued May 26, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 17, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover upon a certificate of insurance for \$2,000 issued by defendant, payable to plaintiff upon the death of her husband.

The facts, so far as material, are stated in the opinion.

James McG. Smith for appellant. The contract between a beneficial order, such as the one in question, and its member is contained in the charter and laws of the former, the certificate of membership issued by it, and the application for membership subscribed by the latter. (*Hellenburg v. Dist. No. 1, I. O. of B. B.*, 94 N. Y. 584; *Baxter v. C. M. F. Ins. Co.*, 1 Allen, 294.) It was part of plaintiff's affirmative case to prove that due proof and notice of the death of Anderson had been given to the officers of the supreme council. (*Hosley v. Black*, 28 N. Y. 438; *Oakley v. Morton*, 11 id. 25; *Garvey v. Fowler*, 4 Sandf. 665; *Knudson v. II. F. Ins. Co.*, 75 Wis. 198; *P. Ins. Co. v. Copeland*, 90 Ala. 386; *Bagley v. Grand Lodge, etc.*, 31 Ill. App. 618; 131 Ill. 498; *Heath v. Ins. Co.* 58 N. H. 414; *McCoy v. R. C. M. Ins. Co.*, 152 Mass. 272; *Dean v. Æ. L. Ins. Co.*, 2 Hun, 358; *Grattan v. M. L. Ins. Co.*, 80 N. Y. 281; *Payn v. M. R. Soc.*, 17 Abb. [N. C.] 53.) The plaintiff was not entitled to the bene-

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fit of \$2,000 provided for in the relief certificate issued to her husband, because the right was conditioned upon his paying his assessments, and continuing to be a member until his death, neither of which conditions was satisfied. (*Holly v. M. Co.*, 105 N. Y. 437.) Payment to the wife of the secretary was insufficient. (*Whiting v. M. Ins. Co.*, 129 Mass. 241; *Morawetz on Corp.*, § 248.) Plaintiff had no right to commence this action until after the remedies provided for in the constitution and laws of the order had been exhausted. (*S. C. O. C. F. v. Forsinger*, 7 Law Rep. 501.) The court erred in allowing interest prior to the commencement of the action. (*Newman v. C. M. Ins. Co.*, 76 Iowa, 56; *McLaughlin v. W. C. M. Ins. Co.*, 23 Wend. 524.) The evidence in the case is insufficient to support a verdict, and submission of the case to the jury was error. (*Mayer v. E. R. F. L. Assn.*, 42 Hun, 237.)

J. Edward Swanstrom for respondent. This court is precluded from considering any questions arising upon conflicting evidence in the case. (*Sternberger v. Bernheimer*, 121 N. Y. 197.) The society having, by its course of action in permitting the wife of its secretary to receive dues and assessments from members, led the plaintiff to believe that payment to such wife would be valid, is estopped from denying her authority to receive such payment. (*Ins. Co. v. Eggleston*, 96 U. S. 572; *Kenyon v. Knights Templars*, 122 N. Y. 247; *Wyman v. Ins. Co.*, 119 id. 275; *Meyer v. Ins. Co.*, 73 id. 516; *Atty.-Gen. v. C. L. Ins. Co.*, 33 Hun, 138.) The claim that the defendant is absolved from liability because due proof and notice of death were not presented is untenable. (*Payne v. M. R. Soc.*, 17 Abb. [N. C.] 53; *Grattan v. M. L. Ins. Co.*, 80 N. Y. 281.) This is a case where it is proper that ten per cent should be added as a penalty. (Code Civ. Pro. § 3251.)

ANDREWS, J. The obligation of the defendant is expressed in the relief fund certificate, issued to Anders Johan Anderson, the plaintiff's husband, June 4, 1886. It recites that he

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had become a member of the Order of Chosen Friends, and entitled to all the rights and privileges of membership, and to a benefit not exceeding two thousand dollars, which sum, the certificate declares, "shall, in case of death, be paid to his wife, Anna Brita Anderson, in the manner and subject to the conditions set forth in the laws governing the said relief fund, and in the application for membership." By a subsequent clause, it is declared that the certificate shall be in force so long as the insured shall comply with the constitution, laws and regulations of the order, "otherwise to be null and void." In the application for membership referred to in the certificate, the husband of the plaintiff agreed to make punctual payment of all dues and assessments, and to conform "in all respects to the laws, rules and usages of the order," and further, that any claim against the order by reason of his membership, or of any certificate issued to him, shall be filed with the proper officers of the supreme council within one year of the date when it might have been made. Anders Johan Anderson died February 22, 1890, and in July thereafter this action was commenced by the beneficiary to recover the sum mentioned in the certificate. The complaint, among other things, alleged the existence of funds in the treasury of the defendant, out of which the claim could be paid, and that due notice and proof of the death of Anderson had been given to the defendant, and payment of the claim demanded, which had been refused. The allegation of the existence of funds was admitted by the answer, but the allegations as to notice and proof of death and of demand were denied, and the defendant affirmatively alleged that no proof of any kind and no claim upon the relief fund had been made or presented to the defendant or any of its officers.

On the trial, *three* defenses were relied upon: *First*, that the plaintiff's husband had omitted to pay three assessments of ninety cents each, which had become payable prior to his death, whereby he became suspended from membership in the order, and had forfeited any right under the certificate; *second*, that on the 28th day of January, 1890, he severed his

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connection with the order by written notice delivered to the secretary of the Svithiod Council (to which he belonged); *third*, that no notice or proof of death had been served on the defendant prior to the commencement of the action. The first defense, if sustained by the facts, was a conclusive answer to the action. By the relief fund laws of the order, both the amount and time of payment of assessments are prescribed. They are payable without notice or demand to the secretary of the subordinate council on the first and fifteenth of each month. The non-payment by any member of any assessment at the time limited, results *ipso facto* without notice or any action by the order in his suspension from beneficiary membership, and forfeits any right under his certificate, until he is reinstated in the manner pointed out by the laws of the order. The question whether Anderson was in default at the time of his death for non-payment of assessments, was sharply litigated. Evidence was given on the part of the defendant tending to show that the deceased was delinquent in the payment of the three assessments mentioned, and that his suspension therefor had been reported to the subordinate council by the secretary. On the other hand, the plaintiff claimed, and her claim was supported by evidence, that on the 28th of December, 1889, she had caused to be paid to the wife of the secretary, at his residence, in behalf of her husband, assessments in advance, covering all which would fall due prior to February 22, 1890, the date of his death. This evidence was accepted by the jury, and the fact, as claimed by the plaintiff, must on this appeal be deemed established.

But it is insisted in behalf of the defendant that payment to the wife of the secretary was not binding on the defendant, unless the money actually came into the secretary's hands, and the contrary ruling of the trial judge presents the only question of law under the first defense mentioned. The duties of a secretary of a subordinate council are prescribed in its constitution, and among other things he is to receive all moneys for the relief fund, which consists of assessments paid by members of the order entitled to relief benefits. The secretary is

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required to give a bond for the faithful performance of his duties, and the subordinate council may permit him to select an assistant secretary, for whose acts, however, he is made responsible. It was proved without contradiction that it had been the common practice for members of the council to pay dues and assessments to the wife of the secretary in his absence. The secretary (it seems) had no office, and payments were made to him or to his wife at his residence. It does not appear that any question had been made at any time as to the authority of the wife to receive payments from members. There is nothing in the rules of the council limiting the powers of the secretary to a receipt in person of assessments, or which prevents him from appointing a clerk or agent to discharge the clerical duty of receiving money from members at his house in his absence. The uniform practice proved and the absence of any evidence of dissent on the part of the council or its officers, justify the conclusion that it was known to and approved by the council, and that the secretary's wife was virtually his assistant in receiving assessments. The first defense was not we think sustained.

To sustain the second defense the defendant introduced a formal written resignation of membership in the order, purporting to have been signed by Anderson, January 28, 1890. The genuineness of the document was controverted. The plaintiff testified that the signature was not her husband's. The secretary testified that he drew the paper at the request of Anderson, who signed it in his presence and delivered it to him. Evidence was also given in behalf of the plaintiff by physicians and others tending to show that Anderson was insane at the time of the alleged execution of the paper. The judge submitted to the jury the question whether Anderson signed the paper, and also the question of sanity. No exception was taken to the correctness of his instructions upon this point and the finding of the jury disposes of the second defense.

The third defense presents a question of more difficulty. The claim on the part of the defendant is that no right of

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action accrues on a certificate for a death benefit until the claimant furnishes to the supreme council of the order proof of death, nor until the officers of the supreme council have had an opportunity to consider the claim, and decide upon its allowance or rejection. In support of this contention reference is made to a section in the constitution of the supreme council of the order, which declares that "No claim for any benefit from the relief fund shall be paid until complete proof of the justness of the claim has been made in accordance with such laws, regulations, forms and decisions as have been or may be made or prescribed by this supreme council or its proper officers or representatives." (Const. Art. 2, § 2.) The plaintiff testified that a few days after her husband's death she called upon the secretary of the subordinate council and presented to him a physician's certificate of the fact of death, and that the secretary informed her that he already knew of the death, and assured her "that everything would be all right;" that on the same day she called on the councilor of the lodge, who informed her "that he would see that I got my money and everything would be all right." The secretary and the councilor deny that any certificate of death was exhibited to them, or that the plaintiff made any claim under the certificate, or that they recognized her right to any benefit thereunder, and they testified that it was understood, both by the plaintiff and themselves, that her husband had forfeited all right to a benefit by his neglect to pay assessments. Upon the evidence of the plaintiff the question arises whether she was bound by the relief fund laws of this order, or by the terms of the certificate, to do anything more in respect to giving notice or furnishing proof of death than to notify the secretary and councilor of the subordinate council and produce the physician's certificate of death, in the absence of any demand for further proofs made by or in behalf of the defendant.

The defendant is incorporated under the laws of Indiana. The supreme officers of the order and representatives chosen to the supreme council is the governing body, possessing the

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supreme legislative and administrative authority. The supreme council grants charters to subordinate councils and prescribes their constitutions. Members of the order become such by election as members of a subordinate council, upon such election being approved by designated officers of the supreme council and paying certain prescribed assessments and dues. The relief fund arises from periodical payments by the beneficiary members to the subordinate council to which they are attached. The supreme officers, under prescribed regulations, grant benefit certificates to beneficiary members. The subordinate councils are the delegated agencies of the supreme councils to collect and remit the assessments for the relief fund, which is exclusively managed by the supreme council and its officers. The general scheme in respect to the presentation and proof of claims for death benefits, as disclosed by the relief fund laws referred to in the certificate, is to impose upon the subordinate council of which the deceased was a member, the duty on the death of a member of investigating the matter, and through its own officers preparing and forwarding to the supreme council or its officers, proofs of death according to certain forms promulgated by the supreme council. There is no duty, certainly no clear and definite duty imposed by the relief fund laws or the laws or regulations of the order upon a claimant under a certificate, to furnish proofs of death, as in case of ordinary life insurance.

By article 3, section 2 of the relief fund laws, it is made the duty of the secretary of the subordinate council, on the death of any member, to notify the supreme recorder thereof, "in accordance with a form furnished by the supreme council." This notice is to contain certain particulars, many of which could ordinarily be known only to an officer of the council. The section provides that "further proof" may be required by the supreme council. The forms of proof promulgated comprise a notice of death addressed to the subordinate council, embracing full particulars as to the deceased, when admitted as a beneficiary member of the order, when the first and last assessments were paid by him, the total amount paid into

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the relief fund, the amount of benefits already received, if any, and other particulars. This notice is followed by a form of a resolution of the council referring the matter to a committee for investigation, and by a form of a report to be made to the council by the committee so appointed, to which is to be attached an affidavit of the undertaker and attending physician, with the recommendation of the committee approving or disapproving the payment of a death benefit in the case. By section 8 of the same article of the relief fund laws before referred to, all proofs for death or disability benefits are required to be passed upon and approved or rejected by the subordinate council and by the medical examiner, and are then to be forwarded to the supreme council, and the board of claims of that body is then to pass upon the claim, and may approve or reject it.

We think it is reasonably clear, from an examination of the scheme for the administration of the relief fund and of the laws governing the payment of death claims, that no duty is cast upon a claimant to furnish proofs of death as a prerequisite to maintaining an action on the certificate, and that the plaintiff was not required to do more than to notify the officers of the subordinate council of her husband's death. The duty was thereby cast upon the council to make the investigation and proofs for the information of the supreme council. This conclusion is decisive against the third defense.

It is true that the liability of the defendant under the certificate to make payment did not accrue immediately on the death of Anderson. The liability assumed by the defendant is not absolute. The scheme contemplates a presentation of proofs of death and an adjudication of the defendant's liability by the board of claims, composed of officers of the supreme council, before payment can be made. This procedure cannot be ignored by a claimant. While an adverse decision by the board of claims may not preclude resort to an action, there seems to be no reason why the matter should not be first submitted to the judicatory established by the laws of the order, or some reason shown excusing such submission.

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It does not appear in this case whether the subordinate council took any action, or gave any notice, or furnished any proof of death to the supreme council. It is unnecessary to consider how an omission by a subordinate council to perform its duty in these respects would affect the rights of a claimant. We here simply decide the point presented, viz., whether any duty rested upon the plaintiff under the laws of the order to furnish proofs of death.

We think no error is disclosed by the record in respect to any of the issues tried, which justifies a reversal of the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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CHARLES HARTSHORN, Respondent, v. RANSOM M. CHADDOCK,
Appellant.

A riparian owner, who, by his willful act, diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages.

In an action to recover such damages, when the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than the diminution in the market value of the whole property by reason of the injury, the cost of restoration is the proper measure of damages, to which may be added the loss of the use of the property in consequence of the injury; but when the cost of restoring is more than such diminution, the latter is usually the true measure of damages.

In such an action, evidence showing both the cost of restoring the land to its former condition and the diminution in its market value is admissible.

When damages are to be assessed upon one or the other of these two methods, according to the circumstances, and plaintiff's proof is confined to one of them, and defendant fails to supply proof as to the other, or to raise any question on trial as to the failure of plaintiff to supply it, the omission may not be availed of on appeal.

Where, in such an action, evidence was given by plaintiff showing the cost of restoring the land, and none was given by either party in regard to the effect of the injury upon the market value, *held*, that the evidence was sufficient to sustain an award of damages.

(Argued May 26, 1892; decided October 4, 1892.)

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APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

De Merville Page for appellant. The referee adopted an improper measure of damages and received improper evidence to prove the same. (*Burrick v. Schifferdecker*, 48 Hun, 355; *Wallace v. Drew*, 59 Barb. 423; *Van Buren v. F. & M. W. Co.*, 50 Hun, 448; 105 N. Y. 503; 45 id. 562; 53 id. 152; 1 Sedg. on Dam. [7th ed.] 274; *Chipman v. Palmer*, 77 N. Y. 54; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 595.) The referee erred in finding that the plaintiff, or his predecessors, ever had any right to any lands north of the center of the creek. (*Jamison v. Cornell*, 5 T. & C. 629; *Van Wyck v. Wright*, 18 Wend. 157; *Higginbottom v. Stoddard*, 77 N. Y. 94; *Hall v. W. P. Co.*, 103 id. 139; *Smith v. Townsend*, 25 id. 479; *Cook v. McClure*, 58 id. 437; *Halsey v. McCormick*, 18 id. 147; 3 Kent's Comm. 428; *Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Carroll v. Diemel*, 95 id. 256.) The referee erred in admitting the declarations of Magee to Cridler and of Rochford to Thomas. (*McCarthy v. Whalen*, 87 N. Y. 148.) The referee erred in excluding the testimony of Fairchild. (*Kenally v. Selleck*, 21 Wkly. Dig. 72.) Upon the undisputed evidence, plaintiff's father was estopped from claiming the water course of the creek was farther north than it was in 1851. (*Lampman v. Milks*, 21 N. Y. 505; *Roberts v. Roberts*, 55 id. 275; *Pixley v. Clark*, 35 id. 520; *Harris v. Van Wait*, 96 id. 642; *James v. Cowing*, 82 id. 450.) The referee erred in permitting the declarations of Plimpton to be given in evidence and in refusing to strike the same out. (*C. B. Co. v. Paige*, 83 N. Y. 178; *Groat v. Moak*, 94 id. 115.) Plaintiff has wrongfully obstructed the stream, and contributed to the injuries complained of and can not recover for that reason.

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(*Avery v. E. N. Co.*, 82 N. Y. 582; *Woodard v. N. Y., L. E. & W. R. R. Co.*, 106 id. 408; *Pierce v. Kinney*, 59 Barb. 56.) The referee has decided this case upon the erroneous theory that plaintiff's father, had the right to restore the creek to its original channel at any time within twenty years after it had gradually left it. (*Jones v. Turner*, 46 Barb. 533; *Gerrish v. Clough*, 48 N. H. 9; *Pierce v. Kinney*, 59 Barb. 56; *Wetmore v. A. W. L. Co.*, 37 id. 97; *Slater v. Fox*, 5 Hun, 554.) The flood of June first was so extraordinary and unusual as to be deemed an act of God, and defendant is not liable for the injuries caused by it. (*Wallace v. Drew*, 59 Barb. 413; *C. B. Co. v. Paige*, 83 N. Y. 178; Angell on Water Courses, §§ 347, 348, 349; *Jones v. Turner*, 46 Barb. 227; 6 Wait's Act. & Def. 432; *Price v. Harrison*, 44 N. Y. 94.) The proximate cause of this injury was this unusual flood, and the evidence does not justify a finding that these six piles caused the entire damage to plaintiff's property. (*Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Sheldon v. Sherman*, 42 id. 484; Angell on Water Courses, § 347.)

Daniel L. Benton for respondent. Parties who cause a nuisance, by acts done on lands of a stranger, are liable for its continuance, and it is no defense that they cannot lawfully enter and abate the nuisance, without rendering themselves liable to the owner of the land. (*Smith v. Elliott*, 9 Penn. St. 345; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; 4 Wait's Act. & Def. 771; 63 Barb. 111; *Simmons v. Ever-son*, 124 N. Y. 319; *Swords v. Edgar*, 59 id. 35; *Irvine v. Wood*, 51 id. 230; 37 Hun, 38; *Beckwith v. Griswold*, 29 Barb. 291; 9 id. 345; 63 id. 114; *Cohen v. Mayor, etc.*, 113 N. Y. 537; *Wenzlick v. McCotter*, 87 id. 127; *Jones v. Chantry*, 1 Hun, 613; *Campbell v. Seamen*, 63 N. Y. 568; *Snow v. Williams*, 16 Hun, 468.) The proper rule of damage is such damages as the plaintiff had sustained prior to the time of the commencement of the action. (*Jutte v. Hughes*, 67 N. Y. 267; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98-117; *Barrick v. Schifferdecker*, 123 id. 52.) The

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defendant had no right to create a nuisance and speculate as to the probable consequences of his act. (*Salsbury v. Hirscheroode*, 106 Mass. 458; *Dickinson v. Boyle*, 17 Pick. 78; *Woodward v. Asorn*, 35 Me. 271.) Exceptions of the defendant are untenable. (Code Civ. Pro. §§ 1864, 1865; *Jutte v. Hughes*, 67 N. Y. 267; 109 id. 202; *Rindge v. Baker*, 57 id. 209; *Murtha v. Curly*, 90 id. 372; *Thatcher v. H. C. Assn.*, 46 Hun, 594; 12 id. 247-251; 36 id. 353; *E. L. Ins. Co. v. Cuyler*, 75 N. Y. 511-514; *M. L. Ins. Co. v. Meeker*, 85 id. 614; *Acer v. Hotchkiss*, 97 id. 408.)

O'BRIEN, J. The recovery in this case is based upon the wrongful obstruction by the defendant of a stream or water course, in consequence of which the plaintiff's land was flooded and the soil washed away and personal property thereon destroyed. The trial was had before a referee, and as the evidence was conflicting upon the essential issues of fact, we must be governed by the findings in reviewing the case. The Canacadea creek is a non-navigable stream, originally over one hundred feet in width, passing through the city of Hornellsville in an easterly direction. The lots of the plaintiff are on the southerly bank of this stream and those of the defendant on the northerly and nearly opposite each other. The lands in the vicinity have been from time immemorial subject to some overflow from the creek during freshets and in time of very high water, though it does not appear what if any damage resulted therefrom. In order to protect the lots abutting upon this creek, at the point in question, from the overflow, the owners on both sides had raised the banks by driving piles into the soil along the shore and covering them with planks and filling in behind with dirt and rubbish. On the northerly side, and in front of the defendant's lands, the stream had been encroached upon in this way prior to the year 1888, and narrowed so as to cause the water to flow upon the land of the plaintiff on the southerly side, though it does not appear that up to that time any very serious damage resulted. During the summer of 1888 the defendant extended

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the piling, in front of his lands, some twenty-five or thirty feet farther into the bed of the stream. This new line of piles was covered with plank and filled in behind with earth and rubbish and constructed in such a way that the water would not flow through it. The referee finds that this formed a solid dam or obstruction extending into the channel of the stream, as it then flowed, obstructing the flow of water for nearly one-third of its width, as it existed before. The channel of the stream in front of the plaintiff's lands was thereby narrowed and obstructed to the extent of at least twenty feet. It is also found that the act of the defendant, in thus obstructing the flow of water in the stream, was illegal and dangerous to the lands of the plaintiff on the opposite shore, in time of freshets or high water. That on June 1, 1889, after a long and heavy rain, the water in the stream raised several feet, and increased in volume and velocity and the flow of the water was dammed and obstructed by the defendant's piling, and the water was thereby displaced and forced upon the lands of the plaintiff. That this flow of the water upon the plaintiff's land washed out his piling and the soil along the shore, and destroyed or carried away lumber, shingles, wood and other personal property of the plaintiff on his land. It is found that though the freshet was unusual, with respect to the volume of water, yet that similar ones but of less power have occurred in the past and are liable to occur in the future, from heavy rains or melting of snow, and in such cases the obstruction in the stream, created by the defendant, must force the water from its natural channel in which it was originally accustomed to flow upon the lands of the plaintiff. The referee reported that the plaintiff was entitled to judgment for the damages caused by the diversion of the water from the channel of the stream, by the defendant's act, to the plaintiff's lands, and he assessed the damages at \$866.25. The General Term has affirmed the judgment.

Irrespective of any question of negligence or malice a riparian owner who by his willful act diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor is liable for the resulting

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damages. (*McKee v. D. & H. C. Co.*, 125 N. Y. 353.) All the facts necessary to the application of that principle have been found by the referee, and none of them are so destitute of evidence for their support as to warrant us in disturbing the judgment. There is, however, a question of law in the case of some importance. The referee allowed the plaintiff \$320 the cost of sixteen hundred cubic yards of soil washed away by the flood. On the trial a witness for the plaintiff was asked the following question: "What is the value per cubic yard of filling in that washout?" The defendant objected that the testimony was incompetent, and that the measure of damages sought to be proved thereby was improper. The referee overruled the objection and the defendant excepted. This exception raises the question whether this evidence was competent and admissible to prove the damages which the plaintiff had sustained.

There is no doubt that the diminution in the value of the land is the general rule for measuring the damages in an action for an injury to real property of a permanent character. But this rule is subject to some exceptions, as it would in some cases be incapable of application. If my neighbor remove from my land, by means of a trespass, a load of sand or gravel, the act might have no appreciable effect upon the value of the property as a whole, and yet I would be entitled to damages, but in that case they would be measured by the value of the sand or gravel removed, and the expense of repairing any injury caused by its removal. If buildings are injured, fences or other fixtures removed, the cost of restoring the buildings and the value of the fixtures would generally constitute complete indemnity. In this case the defendant is chargeable with removing a portion of the soil from the plaintiff's land. Had the quantity removed been one yard, instead of sixteen hundred, no one, it is believed, would then contend that the plaintiff would be restricted to such damages as he could show by the diminution in value of the land. In this respect, the present is a border case. It is difficult to formulate a general rule that would apply to all cases of injury, such as this, to

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real property. Had the defendant broken a window in the plaintiff's house, there is no doubt that the cost of completely repairing it would be the proper measure of damages. There are many cases of injury to real estate where the cost of repairing the injury may be the proper measure of damages.

The owner is not in every case of injury to the soil, the trees or the fixtures, driven to proof of the diminution in value of the estate by reason of the injury, in order to establish his damages. The rule seems to be that when the reasonable cost of repairing the injury, or, in this case, the cost of restoring the land to its former condition is less than what is shown to be the diminution in the market value of the whole property by reason of the injury, such cost of restoration is the proper measure of damages. On the other hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages, the rule of avoidable consequences requiring that in such a case the plaintiff shall diminish the loss as far as possible. (Sedgwick on Damages [8th ed.], §§ 932, 939, 947; *Graessle v. Carpenter*, 70 Iowa, 166; *Walters v. Chamberlin*, 65 Mich. 333; *Lentz v. Carnegie*, 145 Penn. St. 612; *Duffield v. Rosenzweig*, 144 id. 539; *Seely v. Alden*, 61 id. 302.)

The loss of the use of the property in the meantime, in consequence of the injury, has sometimes been allowed, and would seem to be reasonable and just. Therefore, proof of the cost of restoring the land to its former condition, and proof of the diminution in the market value of the lot, was in this case alike admissible. There were two methods of measuring the damages depending upon circumstances, and all competent evidence offered should have been received by the referee, and hence it was not error to admit proof of the cost of restoring the soil to the condition it was in before the overflow. (*Seely v. Alden*, *supra*.)

But there was no evidence offered by either party in regard to the effect of the injury upon the market value of the lot and we cannot know from the record whether the diminution in value was more or less than the cost of restoration. The evidence offered, being competent, furnished some proof as a

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basis for the award of damages, and it cannot be said that the referee's finding as to the amount of damages sustained, is wholly unsupported by proof. When things attached to the soil, and, therefore, part of the realty, are injured or destroyed or some part of the soil itself carried away, the value of the thing injured or destroyed and the cost of replacing or restoring it, or the expense of restoring the soil to its condition prior to the injury or trespass, may be proved in an action by the owner to recover his damages. When all the evidence is in, it may turn out that the diminution in value of the freehold is the legal measure of damages, but the value of the thing taken or the cost of reparation is none the less evidence upon the question. (*Barrick v. Schifferdecker*, 123 N. Y. 52; *Argotsinger v. Vines*, 82 id. 308.)

The defendant's exception was aimed at the question of the admissibility of the evidence, and on that point the appeal must stand or fall. He did not raise the question that the testimony, though admissible, was not complete or sufficient to warrant the assessment of damages by the referee. The defendant could have proved the diminution in value of the lot either on cross-examination of the plaintiff's witnesses or upon his defense, but as he omitted to do this, or to raise any question except the admissibility of the testimony, he must be deemed to have waived the necessity of further and more complete proof on the part of the plaintiff. When, as in this case, damages are to be assessed upon one of two methods, according to circumstances, and the plaintiff's proof is by one of these methods only, and the defendant fails to supply the other mode of proof, which may be more favorable to him, or to raise any question as to the failure of the plaintiff to supply it at the trial, an appellate court ought not to reverse the judgment, especially in a case like this, where there is nothing to show, and no claim even made that the other theory of damages would be more favorable to the defendant.

As the ruling of the referee, which is challenged by the exception, was strictly correct, the judgment should be affirmed.

All concur.

Judgment affirmed.

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CONSTANCE B. PRICE, Respondent, v. DE WITT C. HOLMAN et al., Executors, etc., et al., Appellants.

Plaintiff commenced an action against her husband, P. and others, claiming in substance that the other defendants gave to P. a bond secured by mortgage for \$50,000, of which sum \$10,000 belonged to her, it having been delivered to P. upon his agreement that he would hold the mortgage in trust for her for that sum. The relief asked for was that it might be adjudged that plaintiff was the owner of said securities to the extent of \$10,000 and interest from their date, and that her rights as such owner be enforced. P. died pending the action and his executors were substituted as defendants. The referee found that \$5,000 of plaintiff's money was included in the mortgage, and to that extent P. took and held it as her agent and trustee, and she was entitled to the benefit of the securities for that sum with interest. Before entry of judgment plaintiff moved for leave to file a supplemental complaint, and that the case be referred back to the referee to report what if any payments had been made upon said securities and what interest should be allowed. She alleged payments had been made to P. of principal and interest, on the mortgage including the whole or the greater part of the sum belonging to her which he used and treated as his own, and claimed that he and his estate was by this act and the denial of her rights chargeable with compound interest. The motion was denied. Plaintiff thereupon commenced this action alleging that the mortgagors had paid all of the interest and \$17,000 of the principal, but that no part thereof had been received and kept for plaintiff. She asked for an accounting and that compound interest be allowed to her. Judgment was subsequently entered in the first action. The defendants made a motion entitling the papers in both actions for leave to pay into court the amount of said judgment with interest for the benefit of plaintiff, which motion was opposed on the ground that she was entitled to more than simple interest. The motion was granted, the order providing that upon such payment the judgment should be fully discharged and satisfied. The money was paid to the county treasurer as directed and, upon subsequent motion by plaintiff, that officer was directed to pay and did pay over the sum deposited to her and her attorney, who satisfied the judgment. Defendants pleaded in the second action said judgment, its payment and satisfaction as a bar. *Held*, that the matters set forth as a cause of action in the second action were embraced within the issue in the former one; and so, that the judgment was a bar.

It did not appear that P. used the moneys paid to him on the bond for his own purposes, or that he in any way made any profit out of them. *Held*, that plaintiff was entitled only to simple interest; that as plaintiff claimed in the first action more than she was entitled to, P. and his

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executors were justified in disputing the claim; that he was not required to pay over to plaintiff her share of the interest or of the principal without demand, and so, in the absence of proof of demand there was no breach of trust which would authorize the compounding of interest as a penalty.

Also, *held*, that in the absence of evidence of bad faith on their part, the fact that the executors appealed from the former judgment, and thus delayed its payment did not render them chargeable with interest on the interest received by them.

A trustee is not chargeable with interest solely because he deposits the trust moneys with his own, or uses them in his business, there must be in addition a breach of trust, a neglect or refusal to invest the fund at the time, or in the manner the trust instrument or the law points out.

(Argued May 26, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 30, 1891, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term, and ordered a new trial.

On the 22d day of November, 1869, the defendants Roessle gave Walter W. Price, the husband of the plaintiff, a mortgage to secure the payment of \$50,000. In November, 1873, the plaintiff commenced an action against her husband and the Roesses, and she alleged in her complaint that in November, 1869, the Roesses were indebted to her upon two promissory notes made by them, amounting to \$10,000; that on the twenty-second day of the same month the Roesses applied to her husband for a loan of \$40,000, to be secured by a mortgage, and he applied to her for the two notes and agreed to take the mortgage for \$50,000, and include them therein and to hold the mortgage in trust for her for that sum; that he loaned the \$40,000 and surrendered to the Roesses the two notes and took from them the mortgage for \$50,000 which remained unpaid; that in October, 1871, Price refused to permit the plaintiff to live in his family any longer and afterward commenced an action against her fraudulently asserting that her marriage with him was void or should be annulled, and that he and the Roesses were doing other things, evincing a

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purpose to dispute their indebtedness to her, and to cheat and defraud her out of her rights in the mortgage; that no interest had been paid to her upon her \$10,000, and that Price refused to make any provision for her support or for the support of the child born of their marriage, and she prayed judgment as follows: "That it may be adjudged and decreed that plaintiff is the owner of said bond and mortgage to the extent of \$10,000, and that that sum and interest thereupon from its date is a lien thereupon in the hands of said Price, and that said Roessles may be adjudged to pay her that portion of the principal, together with the interest, as either or both shall become due from time to time, and that each of the defendants may be restrained and enjoined from doing any act or thing in the premises to the prejudice of any of her rights, and for such other relief as may be just," besides costs. The complaint was unverified and the defendants then served unverified answers denying the allegations of the complaint. That action was referred to a referee and was pending and the trial progressed for several years. Price died in June, 1876, and his executors were substituted as defendants in that action. The referee therein made his report April 21, 1881, and he found as facts that the Roessles gave Price their mortgage for \$50,000 at the date mentioned in the complaint; that a portion of that sum was cash loaned by Price at the time, and notes against the Roessles surrendered to them; that some time before that date Price held \$5,000 of the plaintiff's money as her agent and trustee, and he loaned it to the Roessles and took their note therefor, and that note he surrendered when he took the mortgage and the amount thereof was included in the mortgage, and to that extent he took and held the mortgage as her agent and trustee, and to that extent she became and was interested in the mortgage; that the mortgage after the death of Price came into the possession of his executors, and that no part of the \$5,000 principal or interest had been paid to her; and he found as conclusions of law that the \$5,000 so secured by the mortgage, with interest thereon from October 15, 1869, was an indebtedness to the plaintiff to the payment of which and

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to the benefit of all securities therefor she was entitled ; that the mortgage, to the extent of the \$5,000 and the interest thereon, was held in trust for her and for her benefit, and that she had a lien thereon for that sum and the interest ; that the plaintiff had an interest in and claim upon all moneys in the hands of the executors which they had received as payments on the mortgage, and in and upon all the proceeds from the mortgage or the indebtedness thereby represented that might thereafter come into the hands of the executors to the extent of \$5,000 and interest thereon, and that for the purpose of paying and satisfying that sum the plaintiff was entitled to the benefit of all proceedings to enforce the mortgage, and that she was entitled to a judgment in accordance with the findings, and to an injunction.

Before the entry of judgment upon the report of the referee the plaintiff made a motion for an extra allowance of costs, which were granted to her, and afterward also made a motion for leave to file a supplemental complaint, and in case that should be denied that the cause be referred back to the referee to report specifying what, if any, payments had been made upon the bond and mortgage, and what interest ought to be charged in her favor. In her proposed supplemental complaint she alleged that after the commencement of the action the Roessels made payments to Price of principal and interest upon the mortgage, which he used and treated as his own money ; that such payments included the whole or the greater part of the sum claimed by her as her money covered by the mortgage ; that Price by his denial of her rights in the bond and mortgage, and other conduct, was guilty of a breach of trust, and that in determining the amount to be paid to her, he and his estate should be charged with interest upon the sums so collected, making annual rests in the computation of the same, and she prayed judgment that the executors should account to her for all payments made upon the bond and mortgage, and that it might be determined what sums had been collected and received for her, and that the executors might be charged with interest on such sums, making annual rests, and

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that she might have judgment against the executors for the sum found due, and that the mortgage stand as security for the payment of such sum. In opposition to the motion it was shown that upon the trial before the referee it was proved that all the interest on the mortgage and \$17,000 of the principal had been paid. The motion was denied. Thereafter on the 22d day of April, 1882, judgment was entered in that action pursuant to the report of the referee. The defendant appealed from that judgment to the General Term, and there the judgment was affirmed February 4, 1884, and then the defendant appealed to this court where the judgment was affirmed in April, 1885*.

In June, 1882, the plaintiff commenced this action and alleged in her complaint that the Roessels had paid \$17,000 of the principal of the mortgage, and that all the interest had from time to time been paid to Price and his executors, and that none of the money so received had been kept for the plaintiff, but that the same had been received and kept in disregard of her rights, and mingled with other moneys of Price or his executors, and she prayed judgment, among other things, for an accounting as to the moneys received by Price and his executors, and that interest be computed upon the sums received with annual rests.

After the affirmance in this court of the judgment in the first action, certain attorneys who had acted for the plaintiff gave notice to the defendants of liens claimed by them for costs and counsel fees upon the judgment, and in July, 1885, the defendants made a motion at a Special Term, entitling their papers in both actions, for leave to pay the amount of that judgment, with the interest and costs, into court for the benefit of the plaintiff and others interested therein. The plaintiff opposed the motion on the ground, among others, that she was entitled to more than the interest on the \$5,000, and that she was entitled to the interest to be computed as claimed in this action. The court granted the motion by an order made in both actions, which provided, among other

* See *Price v. Brown* (98 N. Y. 388).

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things, as follows: That the executors might pay the amount of the judgment, with interest to date of payment into court, by paying the sum to the county treasurer for the benefit of the plaintiff and her attorneys having liens thereon; that upon such payment the executors, the estate of Price and the mortgage should be absolutely released and forever discharged of and from all liability and all right, title or interest of, in or to the same whatever on account of the judgment, mortgage and any claim or any trust or interest therein, and also from the right to the payment of any money due, or to grow due, thereon whatever; that the plaintiff and her attorneys having such liens should severally and respectively execute under their hands and seals, acknowledge and deliver a release to the above effect to the executors on a demand accompanied by proof by the certificate of the county treasurer that the money has been paid to him; that this action should be discontinued; that it be referred to a referee named to take proof as to the liens of the attorneys and report to the court, and that the county treasurer hold the money deposited with him until the confirmation of the referee's report and the further order of the court. Pursuant to that order, on the 9th day of September, 1885, the executors paid the money, amounting to \$12,984.04, to the county treasurer, and afterward the plaintiff appealed from the order to the General Term, and there, on the 18th day of December, 1885, the order was modified, among other things, so as to authorize the payment of the money into court, and providing simply that upon such payment the judgments should be fully discharged and satisfied, and that the plaintiff and her attorneys should execute and deliver to the defendants a certificate satisfying and discharging the judgment. The plaintiff then appealed from portions of the order of the General Term to this court, omitting, however, to appeal from that portion of the order which authorized payment of the moneys into court. Subsequently, on the 9th day of March, 1886, on the motion of the defendants, the appeal to this court was dismissed.

On the 8th day of December, 1885, the plaintiff and her

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attorneys, having liens on the moneys deposited, gave the county treasurer notice forbidding payment or return of the moneys so deposited, and that each of them claimed several parts thereof. Subsequently, on the 13th day of April, 1886, upon the motion of the plaintiff and her attorneys, an order was made in both actions, at a Special Term, directing the county treasurer to pay out all the moneys so deposited with him by the defendants to the plaintiff and her attorneys; and pursuant to that order, the county treasurer paid the moneys and the plaintiff and her attorneys satisfied and discharged the judgment.

The defendants did not answer the complaint in this action until May, 1886, and then they answered, alleging as a bar to this action, the judgment in the prior action and the payment and satisfaction of that judgment. They also set forth the orders of the Special and General Terms, authorizing the payment of the amount due upon that judgment into court, and the payment of the amount pursuant to the order to the county treasurer, and the proceedings on the part of the plaintiff and her attorneys to obtain the money from the county treasurer, the action being at issue was brought to trial at a Special Term, and judgment was given to the defendants, dismissing the complaint. From that judgment, the plaintiff appealed to the General Term, which reversed the judgment and ordered a new trial. The new trial was had at the Special Term and judgment was again given to the defendants, and the General Term, upon plaintiff's appeal, again reversed the judgment and ordered a new trial.

The other facts appear sufficiently in the opinion.

A. D. Wait for appellants. The question of amount to which the plaintiff is entitled is *res adjudicata*. The judgment entered in the former action between the same parties is conclusive. (*Le Guen v. Gouverneur*, 1 Johns. Cas. 476; *Bruen v. Howe*, 2 Barb. 586; 5 id. 537; 12 id. 184; *Demarest v. Doly*, 32 N. Y. 281; *Kingsland v. Sparkling*, 3 Barb. 341.) Plaintiff has elected as to her remedy, and is bound by such

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election. (*Bodman v. Clark*, 46 N. Y. 354; *Steinbach v. Ins. Co.*, 77 id. 498.) The complaint shows that both principal and interest have been adjudged to the plaintiff in the former action. She has voluntarily received it and discharged the judgment, and this action can be sustained, if at all, only for an excess, additional rate of interest over and above that included in the judgment. (*Jacot v. Emmett*, 11 Paige, 142; *Story's Eq. Juris.* § 1277.) This was either a claim against the estate necessarily, to be presented to the executors in the ordinary way, or else a claim not against the executors or estate, but against the specific security itself; and plaintiff elected to pursue the security. (*Story's Eq. Juris.* § 1262.) Where the principal is received, all claim for interest is waived, and the receipt of the principal debt, when interest is only recoverable as damages, is a bar to an action for interest. (*Jacob v. Emmett*, 11 Paige, 145; *Swan v. Barringer*, 13 Wend. 639; *Johnson v. Bramon*, 5 Johns. 267; *Tillotson v. Preston*, 3 id. 229; *Cutter v. Mayor, etc.*, 92 N. Y. 166.) The plaintiff cannot split up her demand. (*Secor v. Sturgis*, 16 N. Y. 554; *Jex v. Jacobs*, 19 Hun, 105; *O'Beirne v. Lord*, 43 N. Y. 238.) No such action can be maintained without first request to trustees and their refusal. (*W. R. R. Co. v. Nolan*, 48 N. Y. 515.)

James Lansing for respondent. Walter W. Price, having received in his lifetime \$5,000 of plaintiff's money in trust to invest the same, and to pay over the income and profits to her, and having denied the trust and mingled the money received by him with and treated them as his own, while living, he, or his personal representatives after his decease, became liable to account for the profits received, or, as an alternative remedy, by way of penalty, to pay compound interest or interests with annual rests, at the election of the plaintiff. (*Duffy v. Duncan*, 35 N. Y. 187-191; *Barker v. White*, 58 id. 204-214; 2 *Story's Eq. Juris.* §§ 1277, 1279; 2 *Pom. Eq. Juris.* 1063, 1076, 1081; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Scheffelin v. Stewart*, 1 Johns. Ch. 620; *McLeod v. Evans*,

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57 Am. Rep. 286; 66 Wis. 401; *Hooley v. Gieve*, 9 Abb. [N. C.] 21, 23, 40; *N. Bank v. Ins. Co.*, 104 U. S. 54.) The contention of the defendant's executors, that the recovery in the former suit is a bar to the recovery herein, because the recovery sought in the present case was or might have been made in the former suit, is untenable. (*McCullough v. Colby*, 4 Bosw. 603; *Watson v. Thelow*, 17 Abb. Pr. 184.)

EARL, Ch. J. The General Term reversed the judgment of the Special Term upon questions of law only, and hence, in our review here, we must take the facts as they have been found so far as there is any evidence to support them. The facts material to the disposition of this case are not much in dispute, and there are at least two grounds upon which, we think, the judgment of the Special Term can stand.

The plaintiff has received the principal of what we will call the trust fund, with the simple interest thereon, and that is all, upon the facts established, to which she was entitled.

We have not a very definite description of the trust created by the plaintiff and her husband. All we know about it is that she placed the sum of \$5,000 in his hands for investment for her, and that, with her assent, he invested it in the mortgage for \$50,000, and she thus became interested in that mortgage to the extent of the \$5,000. Seventeen thousand dollars were paid upon the mortgage in the lifetime of Mr. Price, besides all the interest due thereon. There is no evidence that he took that \$17,000 as including her \$5,000, or any part thereof. Under his agency to invest, he could treat her \$5,000 as still invested in the mortgage, and so all he can be charged with receiving for her is the annual interest on that sum. It does not appear what, under his agency for her, he was to do with the interest, whether he was to reinvest it for her, or pay it over to her, or keep it for her until she called for it. Nor does it appear what he did with the interest as he received it. It does not appear that he used it in his business, or for his own purposes, or that he in any way made any profit out of it. In the absence of proof, we must assume that he, a man of

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wealth, had the money, or its equivalent, at all times ready to respond to any call she might make. . She was undoubtedly entitled to the interest upon demand, but she never demanded it, although she must have known that it had been received. She commenced her original suit without any demand, and in her unverified complaint alleged an investment for her by her husband of \$10,000 in the mortgage. He did her no injustice by disputing and denying her excessive and unjust claim.

But if we assume that, as she owned one-tenth of the mortgage, one-tenth of the \$17,000 paid upon the mortgage, to wit, \$1,700, was received for her, then what was Mr. Price bound to do with that \$1,700? We do not know enough about his agency to say that he was bound to reinvest it. What trust was there as to that sum? So far as the evidence discloses, he simply became indebted to her for that sum, and liable to pay it to her upon demand. She could have sued him for it, and thus have compelled payment to her with simple interest. It was not paid to him for investment, and it does not appear that he made any profit out of it. If there was any breach of trust, it was simply in not paying it over to her, and for such a breach the simple interest is the general measure of damages, and that she has received. We see no ground for compounding the interest as a penalty, or punishment of Mr. Price for misconduct.

In *Rapalje v. Hall* (1 Sandf. Ch. 399), it was held that a trustee is not to pay interest, even simple interest, solely for the reason that he deposits the trust moneys indiscriminately with his own; nor because he makes use of them in his own business; that there must be superadded a breach of trust, a neglect or refusal to invest the fund at the time or in the mode which the trust instrument or the law itself has pointed out. To the same effect is *Jacot v. Emmett* (11 Paige, 142).

The law exacts of a trustee fidelity to his trust. If he is guilty of fraud or the mismanagement of the trust fund, or is guilty of a breach of trust, or has used the trust funds for his own purposes and made a profit therefrom, he may be compelled to pay interest, and in extraordinary cases com-

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pound interest, so as to place the *cestui que trust* in the same situation as if the trustee had faithfully performed his proper duty. Here all the elements as grounds of liability for interest upon the moneys paid to Price upon the mortgage are wanting.

It is said that he ought to be charged with interest because in his answer interposed to the complaint in the original action, he denied the trust. It does not appear that he ever denied or repudiated the trust before that action was commenced. He simply denied in his answer the alleged trust for \$10,000. It is difficult to perceive how that denial, in the absence of fraud in the management of the trust fund and of any breach of the trust, affected his situation or in any degree increased his liability or justly exposed him to any penalty or punishment.

We, therefore, conclude that there was nothing in the facts existing prior to the death of Mr. Price, which entitled the plaintiff, as matter of law, to more interest than he has received; nor is her case any stronger against the executors. They found the original suit pending untried when they assumed their duties as executors. They found a complaint asserting a claim upon the mortgage for \$10,000, and an answer interposed by their testator denying it, and they had no personal knowledge of the matter. What could they do under such circumstances? They could not with safety or propriety allow the claim, and they certainly were not bound to allow it. It was their apparent duty to defend the action and obtain the judgment of the court upon the plaintiff's claim, and that judgment was that her just claim was only \$5,000, and the interest thereon. It thus turned out that it was their duty to defend the action. While the suit was pending they received the interest upon the mortgage. That interest, prior to September, 1879, they kept with other funds belonging to the estate of their testator, and after that date they deposited all the interest paid upon the mortgage in a separate bank account. They made no use of the interest thus paid and no profit out of it. The plaintiff made no demand of the interest and was

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making an excessive claim in her action. What could the executors do except to hold the interest ready for the plaintiff and subject to the final judgment in the pending action? There certainly is no basis for holding the executors liable to pay interest upon the interest thus received by them, and there is absolutely no authority which would sanction such a holding.

But it is said that the executors appealed from the judgment and thus delayed the plaintiff in obtaining the fruits of her judgment, and that, therefore, they should pay her compound interest, or the interest upon the interest received by them. It does not appear that they acted in bad faith or maliciously in bringing the appeal, or even unreasonably. It is true that they were defeated. (98 N. Y. 388.) But there were fair questions for debate upon the appeal, and the executors should not now be punished for bringing the appeal. The mortgage run to their testator and they held it, and hence, during the pendency of the litigation and of the appeal, the interest was paid to them. What could they do but to receive it and hold it until final judgment upon the rights of the parties, or at least until some proper demand was made for it? By bringing the appeal they exposed themselves to the usual penalty, to wit, the payment of the accruing interest upon the judgment and the costs allowed by law. Such interest and the costs are in the law the measure of the injury done to the opposite party by the appeal.

But there is another ground for defeating this action which we think did not receive proper consideration by the learned General Term. The recovery in the first action is a bar to any recovery in this. It is a general principle that the judgment of a court of competent jurisdiction is final as to the subject-matter thereby determined; final not only as to the matter actually determined, but as to every other matter which the parties might have litigated in the action and had determined. The purpose of the rule is to diminish and put an end to strife and contention between litigants, and to spare the courts the labor and vexation of many suits when one

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would serve to adjust the entire controversy between the parties. (*LeGuen v. Gouverneur*, 1 John. Cas. 436, 492; *Rice v. King*, 7 John. 20; *Bruen v. Hone*, 2 Barb. 586.)

Here the plaintiff's complaint in the first action was sufficient for the recovery of all the interest she now claims, and the proper parties were before the court for the adjustment of the entire controversy between them. If the \$1,700 was in the hands of Mr. Price at the time of his death as plaintiff's money, then she having recovered the simple interest thereon, cannot now maintain this action to recover an additional sum created by compounding the interest. Whatever interest she was entitled to upon that sum should have been recovered in the first action. If she was entitled to interest upon the annual interest received upon the mortgage, why should that not have been adjusted in the first action? She claimed some interest. Why did she not claim it all? The action related to the trust and the trust fund, and the amount of the fund, principal and interest, was in controversy and was to be determined. In that equitable action the court could take and state the account in reference to the fund down to the time of the trial, and could determine what should be done with the interest as it came in after the trial, and could, if needful, render a money judgment against the executors. (Code, § 1207.) It would be contrary to all authority to permit the plaintiff after she has recovered a part of the interest claimed by her to maintain another action to recover more interest, and that too upon substantially the same evidence. It appeared upon the trial of the first action that the \$17,000 had been paid upon the mortgage to Mr. Price, and that the annual interest had been paid, and hence it cannot now be claimed that she did not then know the facts upon which she now bases this action. The first adjudication was not affected with fraud or mistake, and there is no ground whatever for the maintenance of this action to rectify that adjudication, or to agitate anew the controversy which the court was then competent forever to put at rest. The doctrine of *res adjudicata*, properly applied to this case, defeats this action.

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We are, therefore, of opinion that the order of the General Term should be reversed and the judgment of the Special Term affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

JENNY NELSON, Respondent, v. JAMES RUSSELL et al.,
Appellants.

The words "from and after" used in a testamentary gift of a remainder, following a life estate, do not afford sufficient ground in themselves for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context they are to be regarded as defining the time of enjoyment simply and not of the vesting of title.

The presumption is that a testator intends that his dispositions shall take effect in enjoyment or interest at the date of his death, and, upon the happening of that event, unless the language of the will by fair construction makes his gifts contingent they will be regarded as vested.

Words of survivorship and gifts over on the death of the primary beneficiary are to be construed, unless a contrary intention appears, as relating to the death of the testator.

Upon submission of a controversy wherein a vendee sought to be relieved from the performance of a contract for the purchase of real estate the following facts appeared: B. who died seized of the premises, by his will, devised them to his two daughters for life, and "from and after" their decease to two grandchildren named and their heirs, the heirs of a deceased grandchild to take the share "that parent would have taken if living." One of the daughters died prior to the execution of the contract which was made by the other daughter, and the two grandchildren who executed a deed to plaintiff in accordance with the contract while he refused to accept. *Held*, that the grandchildren having survived the testator, took upon his death a vested remainder in fee in the premises; that the provision for their issue was by way of substitution in case of the death of the parent during the life of the testator; and that therefore, the vendor's deed conveyed a good title.

Nelson v. Russell (61 Hun, 528), reversed.

(Argued May 26, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1891, which directed a judgment in favor of

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plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

On March 7, 1891, plaintiff entered into a contract with the defendants, Bridget Russell, a surviving life tenant, and James Russell, James Barry and Ellen Barry, the remaindermen under the will of Michael Barry, deceased, for the purchase of lots 256 and 258 Cherry street, in the city of New York. On April 21, 1891, to which time performance of said contract had been extended, defendants tendered to plaintiff a warranty deed of said premises, executed by all of them, which plaintiff refused to accept, on the ground that it did not convey a good, valid, merchantable or marketable title. Upon a submission of the controversy to the General Term, plaintiff asked that defendant should be required to convey to her a good marketable title or repay to her the amount she had paid on the contract, together with the expenses incurred by her for commissions and examination of title. Defendants asked that it be adjudged that the title tendered by their deed was sufficient. The material facts are set forth in the opinion.

Thomas F. Wagner for appellants. The words "the child or children of a deceased child taking the share which his, her or their parent would have taken if living," refer to a death during the lifetime of the testator. (*In re N. Y., L. & W. R. R. Co.*, 105 N. Y. 92; *Vanderzee v. Singerland*, 102 id. 55; *Livingstone v. Greene*, 52 id. 118; *Doe v. Sparrow*, 13 East. 359; *Black v. Williams*, 51 Hun, 280.) The will must, if possible, be so construed as to give effect to all the words. (*In re N. Y., L. & W. R. R. Co.*, 105 N. Y. 92; *Quackenboss v. Kingsland*, 102 id. 128.) The court will not cut down a fee once given, except upon clear words. (*Moore v. Lyons*, 25 Wend. 119; *Scott v. Guernsey*, 48 N. Y. 106; *Low v. Harmony*, 72 id. 408; *Byrnes v. Stillwell*, 103 id. 460; *Jarmen on Wills*, 194, 414; *Quackenboss v. Kingsland*, 102 N. Y. 128; *Vanderzee v. Singerland*, 103 id. 55.) The court will always construe a remainder as vested and the estate as alienable, if possible, and this was one of the objects of the

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Revised Statutes. (*Moore v. Littel*, 41 N. Y. 75; *Livingstone v. Greene*, 52 id. 123; *Byrnes v. Stillwell*, 103 id. 460; *Embury v. Sheldon*, 68 id. 236.)

John F. McFarland for respondent. It is submitted that James Barry, Ellen Barry and James Russell, and each of them, took an estate in remainder, which was liable to be divested by his or her death after the death of the testator, and before the death of the life tenant, and that upon such death the child or children of such deceased remaindermen would acquire a vested estate in remainder in said property. (*Nodine v. Greenfield*, 7 Paige, 544; *DePeyster v. Clendening*, 8 id. 294; *In re Ryder*, 11 id. 185; *Striker v. Mott*, 28 N. Y. 82; *Smith v. Scholtz*, 68 id. 61; *Bell v. Southwick*, 70 id. 586; *Nellis v. Nellis*, 99 id. 505; *Moore v. Littel*, 41 id. 66.) Until the death of both life tenants, an indivestible and indefeasible title in fee to said property cannot be given. (*Cump v. Cronkright*, 59 Hun, 488.)

ANDREWS, J. The determination of this appeal depends upon the question whether, under the will of David Barry, his grandchildren James and Ellen Barry took on the death of the testator a vested remainder in fee in the premises No. 358 Cherry street in the city of New York. It is claimed in behalf of the plaintiff, the purchaser of the premises under a contract with Bridget Russell, the daughter of the testator, who took a life estate under the will, and the two grandchildren named, that the remainder was contingent and that in case of the death of the two grandchildren during the life tenancy, or of either of them leaving issue, such issue would take as purchasers the share which would have gone to the parent if living. Upon this ground it is insisted the title tendered was defective.

The controversy turns upon the true construction of the third paragraph of the will, which is as follows: "I give and devise unto my beloved daughters, Catharine Barry and Bridget Russell, all my real property in the city of

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New York, and known as Nos. 356 and 358 Cherry street, and the rents, issues, and profits thereof for and during the term of their natural lives, and from and after the decease of my said daughters, Catharine Barry and Bridget Russell and each of them, I give and bequeath the said premises No. 356 Cherry street to James Russell the son of my said daughter, Bridget Russell, and upon the like events I give and bequeath the said premises No. 358 Cherry street to James Barry and Ellen Barry the children of my son Michael Barry now deceased to be divided equally between them and their heirs share and share alike the child or children of a deceased child taking the share which his, her or their parent would have taken if living." Catharine Barry died before the making of the contract in question.

We are of opinion that by the settled rules of construction the two grandchildren, James Barry and Ellen Barry, who survived the testator, took upon his death a vested remainder in fee in the premises in question, and that the provision for their issue was by way of substitution in case of the death of the parent during the life of the testator. The issue were to take in place of the parent if the parent should die before the testator. Much stress is laid upon the words "from and after the decease of my said daughters," immediately preceding the words of gift of the remainder, as indicating an intention to postpone the vesting until the happening of that event. But the authorities are quite uniform that the words "from and after" used in a gift of remainder following a life estate, do not afford sufficient ground in themselves for adjudging that a remainder is contingent, and not vested, and unless their meaning is enlarged by the context they are regarded as defining the time of enjoyment simply, and not of vesting the title. (*Moore v. Lyons*, 25 Wend. 118; *Livingston v. Greene*, 52 N. Y. 118; *Rose v. Hill*, 3 Burr. 1882; *Doe v. Prigg*, 8 B. & C. 231.) The presumption is that a testator intends that his dispositions are to take effect either in enjoyment or interest at the date of his death, and unless the language of the will by fair construction make his gifts contingent, they will be regarded

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as vested. Words of survivorship and gifts over on the death of the primary beneficiary are construed, unless a contrary intention appears, as relating to the death of the testator. (*Vanderzee v. Slingerland*, 103 N. Y. 55; *Matter of N. Y., L. & W. R. R.*, 105 id. 92.) There is nothing so far as we can discover on the face of the will, aside from the words "from and after," to give any color to the construction that the vesting of the remainder was postponed beyond the death of the testator. Nor is there even the apparent injustice which sometimes results from the rule of construction to which we have adverted. The son of the testator, the father of the grandchildren James and Ellen Barry, to whom the remainder was given, had died before the testator, and there could be no disinheritance of subsequently born issue. The gift was to the grandchildren "and their heirs." Under the construction of the will claimed by the plaintiff, they might never derive any benefit under the will. We think the present judgment cannot be maintained without departing from settled rules of construction which have become landmarks of property.

The judgment should be reversed and judgment ordered for the defendant on the argued case.

All concur.

Judgment reversed.

CAROLINE L. G. SCOTT, Respondent, v. THE HAVERSTRAW
CLAY AND BRICK COMPANY, Appellant.

By the terms of a lease of premises used as a brickyard, the lessee, aside from the payment of rent as stipulated, covenanted to make certain additions and improvements, so as to constitute, when completed, "a proper and substantial brickyard upon the whole of the demised premises," to keep up and maintain the same, and to leave all these improvements, as well as those found upon the premises when said lessee took possession, in good condition, and to preserve the property from deterioration. The lessee sublet the premises to parties who were in possession under a former lease, and owned certain machinery and fixtures then on the premises; these, and also some fixtures and machinery thereafter put upon the premises were removed at the end of the term. In an action to recover damages for breach of the covenants, *held*, that they bound the

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lessee to furnish all things necessary to a brickyard, such as was described, and to leave them upon the premises, and also to provide against deterioration by natural wear and damage of the elements; that defendant was liable in damages for the articles removed, and also for failure to furnish and put upon the premises those required to fulfill the requirements of the lease.

Among other things defendant covenanted to put upon the premises a steam engine of sufficient horse-power and capacity for the purposes of the brickyard. Defendant furnished an engine of less capacity than that called for, which it left upon the premises. It did not appear that plaintiff ever used it or had the benefit of its use. *Held*, that the referee properly considered the case as if no engine had been furnished, and allowed the value of an engine such as was called for.

Defendant also covenanted to leave the surface of the yard in a smooth condition; this it failed to do. *Held*, that defendant was liable for breach of this covenant, and the fact that subsequent to the making of the lease other methods of making brick had been devised which rendered a smooth surface unnecessary, did not change the construction to be put upon the covenant or defendant's liability under it.

(Argued May 27, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages for the breach of certain covenants in a lease.

The material facts are stated in the opinion.

Calvin Frost for appellant. In the first lease the lessee agreed "to keep and maintain at its own cost and expense a proper and substantial brickyard upon the whole of the demised premises." This means one yard covering the whole premises. It also means that every appliance necessary to a fully-equipped brickyard must be put on and left. A covenant to keep in repair requires the covenantor to put in repair, *ergo*, a covenant to keep and maintain a brickyard, requires the making of one. (Wood on Landl. & Ten. 598.) For a breach of the express covenants of the lease the measure of damages is the cost of putting the property in the condition

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in which the defendant agreed to leave it. (*Green v. Eden*, 2 T. & C. 582; *Lockrow v. Horgan*, 58 N. Y. 625.) The kilnsheds, pitsheds, machines, etc., on the Oldfield yard, were put there under a lease which expired April 1, 1877. They were not recovered during such lease. They thereupon became the property of the owner of the land (Mrs. Scott), and were her property on the 31st day of January, 1878, when the first lease between these parties was made. The underletting to Oldfield was a violation of the lease from plaintiff to defendant. (*Loughran v. Ross*, 45 N. Y. 792.)

Alonzo Wheeler for respondent. Damages by reason of removal of engine, fixtures, burning and pit sheds, brick machines, etc., of Oldfield yard, were not allowable. (*Kerr v. Kingsbury*, 39 Mich. 100; *Penton v. Roberts*, 2 East. 88; *Marshall v. Lloyd*, 2 M. & W. 457; *Weston v. Woodcock*, 7 id. 14; *Ombony v. Jones*, 19 N. Y. 339.) Brockaway and Smith erected several houses and pitsheds after the execution of the lease, which they removed at the end of their term — April 1, 1888. This they had a right to do. (*Ombony v. Jones*, 19 N. Y. 234; *Van Nest v. Polard*, 2 Pet. 137; *Naylor v. Collings*, 1 Taunt. 19.) It was error to reject the evidence offered to prove the usage or custom of tenants to remove brick machines erected by them on leased premises. (1 Greenl. on Ev., § 294; *Van Ness v. Placard*, 2 Pet. 137; *Well v. Vaile* 49 N. Y. 464; *Johnson v. De Peyster*. 50 id. 666.)

O'BRIEN, J. The plaintiff recovered damages for the breach, on the part of the defendant, of certain covenants in a lease of premises used as a brickyard. The lease covered a period of ten years from April 1, 1878, and contained the following covenants on the part of the defendant, out of which the claim for damages arises :

“That it will, at its own proper cost and expense, maintain and keep up a proper and substantial brickyard upon the whole of the demised premises. That it will keep and pre-

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serve all the buildings, sheds, docks, pits, and other improvements, now on said premises belonging to the party of the first part, or which may hereafter be erected, enlarged or altered, in good repair and condition at its own cost and expense; and at the expiration of said term, or sooner determination of this lease, leave the same, with all docks, buildings, pits, improvements, and fixtures, in good order and condition, the whole thereof to be, at the termination of this lease from whatever cause, and become the sole and absolute property of the party of the first part, and at such time to be surrendered and yielded up to the parties of the first part or their legal representatives in good order and condition.

“That it will not suffer, permit or allow any bats from said yard or vessel, or any other material to be thrown into the Hudson river near the bulkheads or docks, so as in any way to obstruct or interfere with the navigation, or free use thereof, or so as to make the waters of the river in any degree more shallow or less deep.”

“That it will, on the termination of the lease, leave the docks, yards and grounds in good, smooth and regular surface and condition and in good repair. It being part of the consideration of this lease, that the party of the second part shall keep the property from deterioration, and leave on the same all additions and improvements as aforesaid.

“That it will erect, put up and maintain on said premises, a steam engine, for the manufacture of brick thereon, of sufficient horse power and capacity for the purposes thereof, with suitable buildings and fixtures and all machinery required therefor; and that, at the expiration of the term, it will leave the same and every part thereof on said premises in good order and condition, the whole then to be and become the absolute property of the party of the first part; said engine, fixtures, building and machinery being a part consideration for the granting of the term hereby demised.”

The defendant went into the possession of the premises at the date of the commencement of the term fixed by the lease and occupied them, thereunder, until the termination of such

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term. It is alleged and found that there were two leases, the first dated February 23, 1878, made when the plaintiff was a joint owner of the premises with another, for five years, to commence on the first of April thereafter. Subsequently and on January 31, 1879, the plaintiff having become the sole owner, executed to the defendant another lease for five years, the term to commence at the expiration of the term demised in the first, and adopting therein all the covenants of the first lease, with the last paragraph above quoted in addition. These two instruments demised to the defendant two successive terms of five years, and are to be read and construed as one grant. The rent reserved was \$1,200 per year, payable quarterly. The cause was tried before a referee who, upon conflicting evidence, found the following facts with respect to the violation of the covenants above set forth, on the part of the defendant.

"That when the lease went into effect, and the defendant into possession, there were upon the premises, buildings, sheds, docks on the banks of the Hudson river, pits, machines, boilers, engines and appurtenances, fixtures and other improvements belonging to the plaintiff. That during the term other improvements and fixtures were made and erected or put upon the demised premises by the defendant which, by the terms of the lease, became the property of the plaintiff, as a part of the brickyard demised.

"That the defendant failed to keep up and maintain a proper and substantial brickyard upon the whole of said premises, but permitted the same and the docks, sheds, buildings, machines, fixtures, additions and other improvements thereon, as well those thereon at the beginning of said lease, as those afterwards put thereon during said demised term, to become and remain out of repair, and to deteriorate and depreciate in value.

"That at the expiration of said lease the defendant failed to yield and surrender said premises to the plaintiff in good order and condition, and to leave the docks, yards and grounds in good, smooth and regular surface and condition, and free

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from deterioration, but that said docks, yards and grounds were left by the defendant out of repair; of uneven and irregular surface, and the facing upon said yards to a great extent broken and worn out.

"That the defendant during or at about the expiration of the term of said lease, removed or permitted to be removed and taken away from said premises certain buildings, sheds, pits, lumber, machines and other property belonging to the plaintiff, thereby depriving the plaintiff of the same and of the use thereof.

"That the defendant failed to put up, erect, maintain and leave upon said premises in good order and condition, a steam engine of sufficient capacity and horse power, with suitable buildings, and all machinery required therefor.

"That by reason of the premises the plaintiff has sustained damages in the sum of thirteen thousand four hundred and fifteen $\frac{70}{100}$ dollars."

The referee directed judgment for the plaintiff for the sum thus found as damages, with interest thereon from the date of the expiration of the lease, and the General Term has affirmed the judgment.

The covenants in the lease in question differ in some important respects, as will be seen, from the ordinary and usual covenants in a lease of real property to pay a specified rent for the use of the premises in money, and at the end of the time surrender the premises in as good condition as when the term commenced, ordinary use and damage excepted. Here the cash rent reserved was but a part of the compensation of the landlord for the use of the demised premises. The balance was to be paid by the tenant in making certain additions and improvements to the premises, so as to constitute, when completed, a proper and substantial brickyard, and to leave all these improvements, as well as those found upon the premises when he took possession, in *good condition*. Certain parts of what is called in the lease a brickyard the tenant was bound to create or furnish, such as machinery, fixtures and other improvements. He was also to expend money and labor

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upon what he found there when his term commenced, to put it in the condition specified in the lease, that is, *good condition*, and the whole to be kept in that condition up to the date of the expiration of the lease. The fulfillment of these covenants is, by the terms of the instrument, a part of the consideration for which the grant was made. The defendant having covenanted to "keep and maintain, at his own cost and expense, a proper and substantial brickyard upon the whole of the demised premises." This required the defendant to furnish everything necessary to such a yard not on the premises at the commencement of the term, and to keep it up during his term. The lease provides but for one yard, and that was to cover the whole premises. For the use of such a yard the defendant was to put up and maintain thereon a steam engine with sufficient capacity to operate the yard, with fixtures and all suitable buildings, and this was to be left upon the premises when the lease expired. The defendant was to "preserve the property from deterioration," and, therefore, was bound to do something with respect to the property to offset the natural wear and damage by the elements. The tenant was not to permit or allow bats to be thrown into the river near the bulkheads or docks so as to obstruct or interfere with free navigation or use of the water, or to make it in *any degree* more shallow. This required the tenant at the end of the term to remove any bats thrown, or which had fallen into the water in violation of this covenant, or to pay to the landlord the reasonable expense of removing them. As the referee adopted a construction of the lease in harmony with the one here indicated, he had only to inquire whether there was an actual breach of any of the covenants, and to determine the damages resulting therefrom, and these points presented questions of fact which he determined, upon conflicting evidence, in favor of the plaintiff. The legal conclusion is sustained by the findings, and the latter we are not permitted to review because they are certainly supported by some, if not by the just, preponderance of evidence. On the trial evidence was given by both parties as to numerous items of dam-

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ages growing out of the breach by the defendant of the several covenants in the lease. This evidence related to the value of numerous articles, such as machinery and other fixtures which had been taken from the premises, and to still others of the same general character which were never put upon the premises by the tenant. The removal of these on the one hand, and the omission of the tenant to furnish and put them upon the premises on the other, were alike claimed to constitute a breach of the covenants, and the referee so held. The damages awarded, though made up of many items, are stated by the referee in his report in a gross sum. The argument of the learned counsel for the defendant is directed to certain items which he claims the referee included in his decision, and which went to make up the gross sum, which, he insists, should not have been allowed at all, or at a less sum than that awarded by the referee. That the plaintiff was entitled to recover a considerable sum as damages, is not seriously disputed, the main contention in behalf of the defendant being that the amount allowed is too large. We cannot know from the referee's report what particular items he allowed or rejected. The jurisdiction of this court to review errors of law cannot be intelligently or properly exercised in such a case unless all the facts bearing upon the legality of the disputed items are either found or the question presented by some specific request to find. The defendant made some general requests, which are sufficient to raise the question of any liability whatever as to certain items, but the question whether, upon the evidence, the sum allowed, on account of these items, is larger than it should have been, is not before us; that would require an examination of the evidence, a duty which we must assume was performed by the referee and the General Term. We have examined the evidence, however, in regard to the general liability of the defendant under the covenants for the several articles, as to which there is dispute. It seems that the defendant sublet the premises to other parties engaged in manufacturing brick. These parties had occupied the premises under a lease from plaintiff, prior to the one to defendant,

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and had put upon the premises certain machines for making brick, buildings and other improvements. These improvements were on the land when defendant's term commenced, and were used by the former tenants of the plaintiff, who now became tenants of the defendant. With respect to these things, the plaintiff's position is that they were not removed by the parties who put them upon the premises at the expiration of their lease, and as they took a new lease without excepting them or claiming them as their property, their right of removal was lost, and they remained attached to the land and were the property of the plaintiff. (*Loughran v. Ross*, 45 N. Y. 792.)

Or at all events, the things were of such a character that the defendant was bound to put and leave them upon the land under the covenants. Neither the lease prior to 1877, nor the lease from the defendant are in the record, and we have not, therefore, before us all the facts with reference to this property, but we think that upon either ground the referee's finding should be sustained. The defendant did not put into the yard or leave there such an engine as the covenant calls for, but did put in a smaller one, the benefit of which it does not appear that the plaintiff ever had. So far as concerns this article the case is the same as if no engine had been furnished. Had the plaintiff taken the small one with the land, when the lease expired, she would be bound to allow for its value; but as that does not appear, the referee properly allowed for a suitable engine. It is said that this item erroneously includes the cost of a new engine, whereas the covenant contemplated its use before the lease expired, but an examination of the evidence and the opinion of the referee does not sustain this contention. The defendant was to leave the surface of the yard in a smooth condition, and it is found that this covenant was broken and we think it was. This condition of the surface is necessary in order to manufacture brick successfully, in the manner in general use when the lease was made, and the purpose was to have a yard, at the expiration of the demised term, in which the business could be successfully prosecuted.

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The fact that since the lease was made other methods for making brick have been devised, which render this condition of the surface unnecessary, does not change the construction to be put upon the covenant, nor the defendants' liability under it. We have examined the rulings and other questions discussed by the learned counsel for the defendant and have reached the conclusion that the record does not disclose any error which requires a reversal of the judgment and it should therefore be affirmed.

All concur.

Judgment affirmed.

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JOHN A. MULDOON, Respondent, v. JERUSHA DELINE,
Appellant.

Where, by applying the description contained in a deed to the premises, an ambiguity is raised, evidence may be given to explain it, and if some particular of the description is shown to be false or defective, that may be rejected, provided the balance is sufficient to show the intention of the parties; but if, when the description is so applied, no ambiguity is produced, parol evidence is inadmissible to show that it was not the intent to convey all the land included in the description.

B., being the owner of certain premises, conveyed a portion thereof to plaintiff. The description in his deed gave the line between the portion conveyed and the residue as beginning at a certain point on the line of a street and running at right angles therewith. Subsequently, B. conveyed the residue to defendant. In an action of ejectment, it was conceded that the description included the land in controversy, which was a triangular piece lying between the line given in the deed and a line starting at the same point and running diagonally. Defendant offered to prove on trial by parol that it was not the intention of the parties to plaintiff's deed to include the land in question, and that the first course should have run diagonally instead of at right angles with the street. *Held*, that the evidence was properly rejected.

(Argued May 26, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 7, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

Statement of case.

The nature of the action and the facts, so far as material, are stated in the opinion.

M. M. Waters for appellant. The plaintiff must justify the judgment in this action upon the strength of his own title. (*Roberts v. Baumgarten*, 110 N. Y. 380.) Every grant must be so construed, if possible, as to effect the intent of the parties. (*Lush v. Druse*, 4 Wend. 313, 319; 1 Greenl. on Ev. § 301; *Jackson v. Marsh*, 6 Cow. 281.) Plaintiff took exactly the land described by the deed, when its language, being properly construed and interpreted, was applied to the objects mentioned according to the meaning of the language used. (1 Add. on Cont. [8th ed.] 294.) The court, therefore, erred both in taking the case from the jury and in assuming, as matter of law, that the right-angled course should govern. (*Harris v. Oakley*, 130 N. Y. 1-5; *Jackson v. Marsh*, 6 Cow. 281, 283; *Jackson v. Loomis*, 18 Johns. 81; 19 id. 449; *Donahue v. Case*, 61 N. Y. 631.)

Geo. B. Warner for respondent. The opinions or intentions of the parties who executed a written instrument free from ambiguity cannot be given in evidence to alter the signification of its plain language, it must be interpreted according to its terms. (*Humphreys v. N. Y., L. E. & W. R. R. Co.*, 121 N. Y. 435; *Brady v. Cassidy*, 104 id. 147, 148; *Drew v. Swift*, 46 id. 204; *Waugh v. Waugh*, 28 id. 94; *Clark v. Wilby*, 19 Wend. 320; *Adams v. Rockwell*, 16 id. 285 n.; *Long v. M. I. Co.*, 101 N. Y. 638; *Harris v. Oakley*, 130 id. 1.) Where words used as a part of an instrument are not entirely intelligible oral evidence of the circumstances attending its execution is only admissible to aid in its interpretation as between the parties to the instrument. (*Schmittler v. Simon*, 114 N. Y. 176.) Where a deed correctly describes a piece of land, declarations of the grantor orally made or contained in a subsequent deed is not properly received to show what was intended. (*Armstrong v. DuBois*, 90 N. Y. 96; *Drew v. Swift*, 46 id. 204; *Bell v. Woodward*, 46 N. H. 315;

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Gerard on Tit. [3d ed.] 512, 513, 514.) A conveyance is to be construed according to its visible location calls appearing on the land, rather than quantity, course or distance. (*Robinson v. Kime*, 70 N. Y. 147; *Donahue v. Case*, 61 id. 631; *Cronk v. Wilson*, 40 Hun, 269.) A grantee is entitled as against his grantor, and those claiming under him, by a subsequent grant to all the land embraced in his deed whether the quantity was more or less than was intended to be conveyed, the title passes, and the grantee is owner so long as the deed remains unreformed. (*Elliott v. Lewis*, 10 Hun, 388; *Cramer v. Benton*, 60 Barb. 216; *Van Wyck v. Wright*, 18 Wend. 151.) The court correctly ordered a verdict for plaintiff. There was no evidence to authorize a different finding by the jury. (*Lippett v. Kelley*, 46 Vt. 516; *Bond v. Fay*, 12 Allen, 88; *Bulger v. Rosa*, 119 N. Y. 459; *Dwight v. G. L. Ins. Co.*, 103 id. 341; *Alger v. Graham*, 54 id. 258, 360; *Corning v. T. I. & N. Factory*, 44 id. 577; *Barclay v. Howells*, 6 Pet. 499; *F. N. Bank v. Dana*, 79 N. Y. 108.)

EARL, Ch. J. This is an action of ejectment to recover a small triangular piece of land. The parties own adjoining lots and both claim under the same grantor, Burton. The plaintiff took his deed June 29, 1885, and the defendant took his July seventeenth afterward. The land conveyed to the plaintiff is described in his deed as follows: "Beginning in the easterly line of Rust street forty feet north from the southerly line of lot No. 121 on said map, thence easterly at right angles to Rust street 153 feet to the southerly line of lot No. 137, thence northwesterly on the southerly line of lot No. 137 forty feet, thence westerly about 128 feet to the easterly line of Rust street to a point 40 feet north from the place of beginning, thence southerly along the easterly line of Rust street to the place of beginning." It is conceded that this description includes the land in controversy. The defendant upon the trial offered parole evidence of the conversations and negotiations between Burton and the plaintiff, and of other circumstances, to show that it was not the intention of the parties to

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the deed to include therein this land, and that the first course in the deed should not run at right angles with Rust street, but diagonally so as to strike the southerly line of lot 137, forty feet from the southerly line of lot 121. There is no ambiguity in the description contained in the plaintiff's deed. Every line can be surveyed on the ground just as it is given, and the grantor had the land. When the description is applied to the land, no ambiguity is produced, and hence there is no room for parole evidence. It is true that the intent of the parties to the deed must control. But that intent must be ascertained from the language contained in the deed. When, however, by applying the description contained in a deed, an ambiguity is raised, evidence may be given to explain that; and if it be found that some particular of the description is false or defective, that may be rejected, provided the balance of the description when applied to the land, is sufficient to show the intention of the parties. The rule in such cases is derived from the civil law, *falsa demonstratio non nocet, cum de corpore constat*, and is fully explained in the leading case of *Miller v. Travers* (8 Bing. 244), and in 1 Greenleaf's Ev. 301. Here there was no patent or latent ambiguity, and no false description which within the rule could be disregarded.

The defendant in his answer did not allege any mistake, and ask for a reformation of the deed. It is possible that there is a mistake in the description contained in the deeds of both of these parties. If the defendant has any remedy, it is by an action to reform the deeds, and to that action probably Burton, the grantor, would be a necessary party, and perhaps also Harrington, the grantee of the lot lying southerly of the plaintiff's. With all the parties before the court in such an action, parole evidence might be given to show mistake, and if the defendant could clearly establish the mistake he might procure a reformation of the deeds, unless equitable considerations after the lapse of so much time and changed conditions should impel the court to deny the relief. But in this legal action with

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these two parties only before the court the deeds as written must control.

There was no question of fact for submission to the jury and the verdict for the plaintiff was properly directed.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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JEROME B. PARMENTER, Respondent, v. THE STATE OF NEW YORK, Appellant.

While a statute limiting the time in which to bring an action upon contract is held to affect only the remedy, not the obligation, this is with the proviso that a reasonably sufficient time is left in which a party may after the passage of the act commence his action.

A statute cutting down the right to commence an action upon a cause of action then existing, from a period without limitation to a few months after the passage of the act, does not give such reasonable time; and so, is unconstitutional.

The legislature has the right to enlarge the time within which a claim against it may be filed, provided the claim as between citizens would not already be outlawed.

The claimant in 1876 entered into a contract with the state to do certain printing of a public nature for two legislative sessions for \$47,500 each session. Attached to the contract was an alternative bid which had been made by claimant giving specified prices for each piece of work. The contract contained this provision "in the event of an extra session the said work shall be done and materials furnished for the prices stated in the alternative bid annexed, and the same prices shall also be paid for any work and materials ordered not for the use of the legislature." Upon a claim for work ordered by the legislature during the two sessions, but not for its use, *held*, that this work was not included in the gross sum, but claimant was entitled to payment therefor at the prices specified in the bid annexed; that the words "not for the use of the legislature" were not limited to work ordered at an extra session.

The claim was presented under the special act of 1888 (Chap. 541, Laws of 1888), authorizing the Board of Claims to hear, audit and determine it. Claimant filed no claim with the board of audit, nor did he file any claim with the Board of Claims within the time limited by the act of 1884 (Chap. 60, Laws of 1884), for the filing of claims with the latter board which were formerly cognizable by the board of audit, *i. e.*, July 1, 1884. *Held*, that said act of 1888, was a valid exercise of legislative power, and gave the Board of Claims jurisdiction to determine as to

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the validity of the claim; that it was not violative of the constitutional provision (Art. 7, § 14) prohibiting the auditing or payment of any claim against the state "which, as between citizens of the state, would be barred by the lapse of time;" that construing said provision as meaning the general laws limiting the rights of citizens to commence similar actions, six years had not elapsed from the time the claim accrued up to July 1, 1884, when the right to file his claim was taken away; and so, as he had not had that time in which to commence his action, the claim as between citizens would not be outlawed.

Also *held*, that, as the act organizing the Board of Claims (Chap. 205, Laws of 1888) gave no power to file the claim before that board, its jurisdiction being limited to claims accruing within two years prior to the filing of the claim, it only left him the time which elapsed between its passage and May 31, 1888 (about eight weeks), the time limited in which to file it with the board of audit, and thus have the benefit of a transfer to the Board of Claims, and that this, as between citizens, did not give a reasonable time.

Also *held*, that the act of 1884, by which a few days over three months was allowed to a claimant in which to file his claim, did not provide a reasonable time.

Also *held*, that the Board of Claims had power to allow and was justified in allowing interest.

It appeared that while no steps were taken by claimant toward filing and presenting his claim until subsequent to the passage of the act of 1888, for most of the period he was engaged in trying to collect it by mandamus proceedings against the state comptroller, and that much of the delay in the prosecution thereof was caused by the non-action of the courts, which the claimant was powerless to prevent. *Held*, that the claim could not be characterized as stale.

(Argued May 31, 1892; decided October 4, 1892.)

APPEAL from award of the Board of Claims, made November 30, 1890, in favor of claimant for \$59,754.09.

This was a claim arising out of a contract for legislative printing.

The facts, so far as material, are stated in the opinion.

Charles F. Tabor for appellant. The judgment entered against Comptroller Olcott, in the proceedings referred to, is not *res adjudicata* against the state as to any question involved before the Board of Claims. (*Redfield v. Windom*, 137 U. S. 664; *Boynnton v. Blaine*, 139 id. 306; *People v. Barnes*, 114 N. Y. 317; *In re Ayres*, 123 U. S. 443; *Pennoyer v.*

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McConnaughty, 140 id. 1; *Ferguson v. Crawford*, 70 N. Y. 256; *Davidsburgh v. K. L. Ins. Co.*, 90 id. 526; *Robinson v. O. S. N. Co.*, 112 id. 324; *State v. Porter*, 89 Ind. 260; *Reeside v. Walker*, 11 How. [U. S.] 290; *Bresler v. Butler*, 60 Mich. 40; *Weston v. Deane*, 51 Me. 461.) As to all the items of the claim for work done and materials, growing out of this contract, which had been performed and furnished before or after the alternative writ was granted, the judgment is a bar. (*Secor v. Sturgis*, 16 N. Y. 554; *Nathans v. Hope*, 77 id. 420; *Perry v. Dickerson*, 85 id. 347; *Lawrence v. Church*, 128 id. 330; *O'Beirne v. Lloyd*, 43 id. 250; *Lorillard v. Clyde*, 122 id. 45; *Belden v. State*, 103 id. 9.) The Board of Claims erred in holding that the claim filed here for work and materials was not included in the "lump sum" named in the contract. (Laws of 1846, chap. 24; Laws of 1847, chap. 254; Laws of 1859, chap. 437.) The questions growing out of this contract as to its proper construction are questions of law. (*Brady v. Cassidy*, 104 N. Y. 155.) It is, therefore, within the province of this court to examine the contract, and determine whether the construction given thereto by the Board of Claims was the proper one. (Laws of 1883, chap. 205, § 10; *Swift v. State*, 89 N. Y. 56; *Woodruff v. R. & P. R. R. Co.*, 108 id. 47; *Clark v. Devoe*, 124 id. 124.) The act of 1884, so far as it authorizes or empowers the Board of Claims to audit and allow the claim herein, is in violation of section 14 of article 7 of the Constitution. (*McDougall v. State*, 109 N. Y. 80; *Gates v. State*, 128 id. 227; *O'Hara v. State*, 112 id. 153; *U. S. v. Guthrie*, 17 How. [U. S.] 284; *People v. Hayt*, 66 N. Y. 607; *People v. Burrows*, 27 Barb. 93; *People v. Tremaine*, 29 id. 96; *People v. Board of Police*, 75 N. Y. 44; *People v. Turner*, 117 id. 240; *Bucklin v. Ford*, 5 Barb. 396; *Peck v. Randall*, 1 Johns. 178; *People v. Chapin*, 104 N. Y. 102.) In any event, the allowance by the Board of Claims of interest from January 5, 1880, upon the amount which was ultimately determined by the board to be due to the claimant, was error. (*Doyle v. St. James Church*, 7 Wend. 178; *Robinson v. Stewart*, 10 N.

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Y. 197; *Smith v. Velie*, 60 id. 117; *McMaster v. State*, 108 id. 557; *Lewis v. State*, 96 id. 71; *Gates v. State*, 128 id. 227.) There was a settlement and payment in full of the claim against the state for the extra printing of 1877. (*Vedder v. Vedder*, 1 Den. 260; *Coon v. Knapp*, 8 N. Y. 402; *Swift v. State*, 89 id. 62; *McDonough v. Board of Managers*, 96 id. 460; *Danziger v. Hoyt*, 120 id. 190.)

R. A. Parmenter for respondent. Claimant was legally entitled to interest from the time of the breach of the contract by the state. (*Van Rensselaer v. Jewett*, 2 N. Y. 135; *Purdy v. Phillips*, 11 id. 406; *Dana v. Fiedler*, 12 id. 40; *Adams v. F. P. Bank*, 36 id. 255-261; *Mygatt v. Wilcox*, 45 id. 306-310; *McCollum v. Seward*, 62 id. 316-318; *De Lavallette v. Wendt*, 75 id. 579-582; *Supervisors v. Clark*, 92 id. 391-397; *Robbins v. Carll*, 93 id. 657; *Sanders v. L. S., etc., R. R. Co.*, 94 id. 642; *Sayre v. State*, 123 id. 297.) The former adjudication in the Supreme Court, possessing general and original jurisdiction, between the same parties, involving, as it manifestly did, the interpretation of the identical contract for legislative printing, and embracing in the issue the same classes of work and materials, is *res adjudicata* in the case at bar. (*People ex rel. v. Schoonmaker*, 19 Barb. 657; *People v. Stevens*, 71 N. Y. 549; *Rice v. King*, 7 Johns. 20; *Haskin v. Mayor, etc.*, 11 Hun, 436; *Embury v. Conner*, 3 N. Y. 522; *McWilliams v. Morrill*, 23 Hun, 162; *People v. Stevens*, 51 How. Pr. 235; *Smith v. Smith*, 79 N. Y. 634; *Perry v. Dickerson*, 85 id. 345; *Milard v. M. R. & T. R. R. Co.*, 86 id. 441; *Brown v. Mayor, etc.*, 66 id. 390; *Palmer v. Hussey*, 87 id. 303; *Newton v. Hook*, 48 id. 676; *Gales v. Preston*, 41 id. 113; *Blair v. Bartlett*, 75 id. 152; *Dunham v. Bower*, 77 id. 76-79; *Leavitt v. Wolcott*, 95 id. 212; 1 Greenl. on Ev. §§ 523, 524, 528; *Lahr v. M. E. R. Co.*, 104 N. Y. 287; *People ex rel. v. Carter*, 119 id. 559; *Moore v. E. R. R. Co.*, 126 id. 672.) The practice pursued in the former adjudication was in all respects regular and pursuant to the statute and adjudged

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cases, and the Supreme Court was a court of competent jurisdiction for that purpose. (2 R. S. [Edm. ed.] 608, § 55; *People v. Ransom*, 2 N. Y. 490; *The King v. M. P. Co.*, 5 Eng. Com. Law, 266; Wood on Mandamus, 36, etc.; *People v. Supervisors, etc.*, 28 N. Y. 112; *People v. Supervisors, etc.*, 15 Barb. 607; *People v. Supervisors, etc.*, 14 id. 52; *C. Bank v. Canal Comrs.*, 10 Wend. 27; *People v. Baker*, 35 Barb. 105.) As between the parties here, the said former adjudication is *stare decisis*, if not *res adjudicata*, on the legal proposition that the Supreme Court, through its writ of mandamus, possessed concurrent jurisdiction with the board of audit, now abolished, and with the Board of Claims over private claims against the state arising out of contract with state officers entered into pursuant to law. (*Hosack v. Rogers*, 25 Wend. 313, 354, 355; *Hardenburg v. Crary*, 50 Barb. 32, 34; *Palmer v. Hussey*, 87 N. Y. 303, 306, 307; *N. Y. & H. R. R. Co. v. Ketchum*, 3 Keyes, 364; *Bell v. Day*, 32 N. Y. 185, 186; *Carroll v. Carroll*, 16 How. [U. S.] 287; *Cohens v. Virginia*, 6 Wheat. 399; *Alexander v. Worthington*, 5 Md. 488, 489; *Rockhill v. Nelson*, 24 Ind. 424; *Lahr v. M. E. R. Co.*, 104 N. Y. 287.) The statute of 1888, under which this claim is filed with the court below, is constitutional. (*People v. Stevens*, 71 N. Y. 527; *Corkings v. State*, 99 id. 491; *Cole v. State*, 102 id. 48; Laws of 1885, chap. 238; *McDougall v. State*, 109 N. Y. 73, 80; *O'Hara v. State*, 112 id. 145.) Nor is this claim, or any part of it, open to the technical objection on behalf of the state that the claimant could not legally split up his demand and maintain separate actions or proceedings against the debtor state. (*Mills v. Gorman*, 3 Keyes, 40; *McIntosh v. Lown*, 49 Barb. 557; *Secor v. Sturges*, 16 N. Y. 548, 554; *E. & N. Y. C. R. R. Co. v. Patrick*, 2 Abb. Ct. App. Dec. 72; *Zimmerman v. Erhard*, 83 N. Y. 74, 78; *Matthews v. Hope*, 77 id. 420.)

PECKHAM, J. The respondent entered into a contract with the secretary of state and comptroller to do certain printing of a public nature for the sum of \$47,500 for each of two

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legislative sessions. During the first session he did certain printing which he claimed did not come within the description of that for which he was to receive an annual compensation in gross, but that it was provided to be paid for at special rates by another provision of the contract. The claim he made for payment upon such a basis was disputed by the officers of the state. For the purpose of compelling payment of his claim the respondent commenced proceedings by mandamus against the late Comptroller Olcott, and the result thereof was the procurement and entry of a judgment against the comptroller, directing him to draw his warrant for the payment of the work as claimed by the respondent. The judgment was subsequently paid and satisfied of record.

The work for which the respondent claims compensation herein is of the same nature as that for which he was awarded the mandamus, and was performed subsequent to the time when the proceeding to procure the writ was inaugurated. It was necessary in the mandamus proceeding, before the writ could be awarded, to give such a construction to the contract in question as would exclude the claim of the respondent from that class of work which he was bound to perform for the gross sum mentioned. That construction was therein given and a judgment in favor of the respondent followed thereon. He now claims that this judgment is *res adjudicata*, and estops the state from contending for any other construction of the contract than the one already given in the mandamus proceeding. The comptroller was proceeded against in that matter as an officer who was neglecting to perform an official duty, and if it were true that he was guilty of that neglect, he was not in any sense representing the state therein. The proceeding was in the name of the people upon the relation of the respondent against a public officer, while this proceeding is permitted by legislative authority, and is one by the respondent as an individual and against the state in its corporate capacity.

To hold the state estopped by the conclusive character of a judgment against one of its officers in a case like this, would

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be to create an estoppel against the state by a suit or proceeding to which it was not a party, and where it had not granted leave to any one to sue or implead it except by a procedure not taken in the mandamus matter. We are not impressed with the validity of the claim of the respondent upon this question, but in the view we take of the contract that question becomes unimportant, and we do not, therefore, decide it.

We are of the opinion that the contract has been properly construed by the Board of Claims in this proceeding. It may be that the language used in the first part of the contract is of such wide scope as to include all kinds of printing for which the state has ever been in the habit of paying. This language is capable of such a construction as to place it in the power of the legislature to bankrupt the person who had made the contract, if all the printing which might be called for under it were to be included in the gross sum mentioned.

After the agreement to do the printing of each legislative session for a sum in gross, and after the details regarding it were provided for generally in the contract, this further proviso was added: "It is further understood and agreed that in the event of an extra session of the legislature the said work shall be done and materials furnished for the prices stated in detail in the alternative bid annexed; *and the same prices shall also be paid for any work and materials ordered, not for the use of the legislature.*" It is claimed on the part of the respondent that the words above italicized apply, as is plainly stated, to "any work and materials ordered, not for the use of the legislature," while the counsel for the state contends that those words are to be limited as applying to work and materials ordered at the extra session, and not for the use of the legislature.

Extra sessions of the legislature are comparatively of rare occurrence. Still, when they are convened, it is, of course, necessary that printing should be done for them. The parties evidently did not contemplate that the printing at an extra session should be included in the gross sum of \$47,500, and hence it was provided that such printing should be done for

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the prices stated in detail in the alternative bid annexed to the contract. Then follows the provision by which any work and materials ordered, *not for the use of the legislature*, are to be paid for at the prices stated in the alternative bid. The words actually used are broad enough to cover printing ordered, not for the use of the legislature, at a regular as well as at an extra session. It seems to us that the broader construction is not only called for by the language actually employed, but that the circumstances themselves point to such construction as the natural and proper one.

By the use of this language some limitation is put upon the power of the legislature to order printing under the contract and to be paid for by payment of the gross sum mentioned. To restrict the language to printing at an extra session is to do away with almost all its usefulness, because, as has been stated and as is well known to all, extra sessions are of quite rare occurrence, and the power to order printing not for the use of the legislature could be exercised at each regular session, to the possible financial destruction of the public printer, unless there were some such safeguard interposed as is to be found in this limitation if it apply to regular as well as extra sessions. It is said that in the original contract there is a comma instead of a semicolon after the word "annexed" in the above quotation from the contract relating to the extra session and the prices to be paid for printing, so that the language and punctuation would be that the "work shall be done and materials furnished for the prices stated in detail in the alternative bid *annexed*, and the same prices shall also be paid for any work and materials ordered, not for the use of the legislature." We think the presence or absence of the semicolon or the comma is not of the slightest consequence upon this question of construction. The language used and the surrounding circumstances both, as we have said, concur in making it entirely plain that the gross sum applies to printing for the use of the legislature, and that prices mentioned in the alternative bid apply to all work ordered at regular or extra sessions which was not for the use of the legislature.

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It is true that under the terms of the contract as it stands the contractor would be bound to do "extra printing" which might be ordered for the use of the legislature by an act, joint rule or concurrent resolution, which extra printing would be included in the gross sum provided to be paid the contractor. This power might be so used as to perhaps financially ruin the contractor.

The fact that such power existed in regard to one class of printing where it was difficult to limit the amount, might and naturally would induce caution in placing still more power in the hands of a reckless or thoughtless majority. What was generally required for the use of the legislature in the way of printing was also well known, and the contractor might reasonably rely on the honor and sense of fairness of the legislature not to order extra printing to a greater amount than customary or usual. But for printing not for the use of the legislature there naturally might not be such a regular and well established custom, because the things to be printed might vary so in each year that no past year could furnish any reliable guide to the requirements of any future year. Hence the importance of providing for a separate compensation and upon a different plan for printing not for the use of the legislature from that which was provided for under the gross sum. These considerations strengthen the view we take as to the construction of the contract under discussion.

It is, however, urged upon the part of the state, that if the construction of the contract as contended for by the respondent be correct, yet the claim, if between citizens, would be barred by the Statute of Limitations, and hence the Board of Claims had no legal power to make the award it did.

In 1874 an amendment to the 7th article of the constitution was adopted by the people. It is section 14 of that article. The material portion of the amendment reads as follows: "Neither the legislature, canal board, canal appraisers, nor any person or persons acting in behalf of the state, shall audit, allow or pay any claim which, as between citizens of the state, would be barred by lapse of time."

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It is not entirely clear what is the meaning of this phrase, "which as between citizens of the state, would be barred by lapse of time." As was said by RUGER, Ch. J., in *O'Hara v. State* (112 N. Y. 146), there is little analogy between the position of citizens with regard to the enforcement of their legal rights among themselves, and the position of a citizen with regard to the enforcement of his claim against the state. Between citizens the courts are at all times open and each can at any time resort to some legal forum for the enforcement or protection of his claim or right, as against any other citizen.

It is different in regard to the state. Unless with its consent it cannot be sued, and in giving consent it may attach such conditions to the right to sue as may to it seem proper. The counsel for the state concedes what would also seem quite plain, that if there never had been any tribunal created by the state before which the claimant could have pressed his claim, the Statute of Limitations would not have commenced to run, because it would have been absurd to hold there was a statute of limitations within which a claim must be sued when there had been neither a person to be sued, nor any court or tribunal before which the state could be summoned to answer the suit. (*Sanford v. Sanford*, 62 N. Y. 146.) It has been urged that under this amendment the court should look at the claim in the same light as if it were one in favor of one citizen against another, and if in the light of all the legislation regarding it, the claim would as between such citizens be outlawed, then it must be so regarded when presented against the state and the constitutional provisions preventing its audit or allowance must have full force and effect. It has also been urged that the correct view is to regard the general statutes of limitation which actually existed as between citizens during the running of the time since the cause of action accrued, and if by those statutes the claim would not be outlawed it must be regarded as valid so far as that question is concerned, irrespective of any special legislation which might affect the particular claim.

A proper presentation of the subject requires an examination of the statutes which have been passed as to the enforce-

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ment of claims against the state. By chapter 444 of the Laws of 1876, the state board of audit was created, whose duty it was to hear without any limitation whatever as to the time when they accrued, all private claims and accounts against the state, with certain exceptions not here material. This claimant from the time of the accruing of his cause of action in November, 1879, to May 30, 1883, a period of three years and six months, could have filed his claim with that board. This right to file his claim with the board of audit remained until the board went out of existence on the last above-named day by virtue of the passage of the act which created in its place the Board of Claims. This latter board was created by chapter 205 of the Laws of 1883, and among other things jurisdiction was given the board to hear all claims against the state, which should accrue two years prior to the time when such claim was filed. As the claim of the respondent accrued in 1879, more than two years prior to any possible filing with the Board of Claims, this act gave no power to file the claim with that board and only left to the claimant the time which elapsed between the passage of the act, April 7, 1883, and the 31st of May, 1883, in which to file it with the state board of audit, and to thus obtain the advantage of the transfer to the Board of Claims of all claims pending before the board of audit on the 31st of May, 1883, which the act provided for.

After the passage of this act of 1883, the only opportunity left to the claimant by which he could obtain any hearing from any tribunal was to file his claim with the state board of audit before it was abolished, and thus either obtain a hearing by that board or a transfer of the claim to the Board of Claims. This right to file his claim before the board of audit was thus cut down to a period of seven weeks and five days from the passage of the act of 1883, although before its passage the right was not limited by any period of time. If the claim were not filed with the state board of audit before it was abolished, then from that period up to March 25, 1884 (the time when the statute amending the act of 1883 was passed), there was

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no forum to which the claimant could resort for the purpose of impleading the state and obtaining a hearing upon his claim. And only three years and five months had elapsed from the time the cause of action accrued up to the time when by statute the right to file his claim before any tribunal whatever was at once limited to a period of less than eight weeks from the passage of such statute.

The act passed March 25, 1884 (Chap. 60), amended the prior act of 1883 (Chap. 205), and provided that the Board of Claims might have jurisdiction of such claims as were formerly cognizable by the state board of audit provided such claims should be filed on or before July 1, 1884. This act limited the time in which the respondent could file his claim to a few days over three months, and if not filed within that time the effect of a failure was of course the denial of any relief thereafter.

From the time when the claim of the respondent accrued in November, 1879, up to July 1, 1884, a period of but four years and eight months had elapsed, and by the general laws of the state as between citizens no statute of limitation then barred the prosecution of such claim.

The claimant, in fact, did not file his claim either with the state board of audit nor did he avail himself of the privilege granted by the act of 1884, by filing his claim with the Board of Claims prior to July first, or at all. The reason is given, but it is immaterial upon this question. From July 1, 1884, to June 9, 1888, there was no tribunal to which the claimant could present his claim against the state and demand or receive a hearing thereon. In June of the last-named year the legislature passed the act which reads as follows:

"§ 1. The Board of Claims is hereby authorized to hear, audit and determine the claim or claims of Jerome B. Parmenter against the state for extra work, materials and printing done, furnished and performed by him, as the legislative printer, under his contract for legislative printing, made, executed and entered into by the then secretary of state and comptroller, on behalf of the state and by the said Jerome B. Parmenter, on

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his own behalf, bearing date the 8th day of February, 1876, and running for the term of two years from and after the date of said contract, and to make an award therein.

“§ 2. This act shall take effect immediately.”

If this enactment were a valid exercise of legislative power, then the board had jurisdiction to determine the question as to the validity of the respondent's claim.

The counsel for the state, however, assails it upon the ground that it in effect permits the Board of Claims to revive and audit a claim which, as between citizens of the state, would be barred by lapse of time, and hence it is urged that the act is in violation of the provision of the Constitution already cited. Although six years had not elapsed from the time when claimant's cause of action accrued up to July 1, 1884, when the right to file his claim under the general law was summarily and finally taken from him, yet it is now urged that the limitation of the right to file his claim is in effect a statute of limitation, and that if it had been enacted relative to the claims of citizens between each other, the legislation would have been valid, although seriously curtailing the period in which actions might otherwise have been commenced. It is further urged that as the legislation would be valid between citizens, the claim against the state became outlawed July 1, 1884, and the legislature had no right in 1888 to directly or indirectly revive, or audit, or allow it.

The question which first arises is as to the force of the argument of counsel for the state, when he urges that this legislation, if enacted, regarding claims between citizens, would be a valid exercise of legislative power. He urges that the construction of the language of the constitutional amendment first above stated is the true one, and that the special legislation applicable to a claim against the state must be regarded as having been enacted relative to the general statutes of limitation as between citizens. Statutes which bear only upon the time in which to bring actions have been held to affect only the remedy upon a contract, as distinguished from its obligation, provided a reasonable time were left in which a party

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might commence his action after the passage of the statute. (*Reid v. Supervisors of Albany*, 128 N. Y. 364, 373; *People v. Turner*, 117 id. 240; *Terry v. Anderson*, 95 U. S. 628 at 632, and cases cited.)

Viewing the act of 1883 at first separately from that of 1884, and we see the effect is to leave claimant a period of but seven weeks and five days in which to file his claim, or in other words to commence his action against the state, although before its passage there was no limitation whatever in point of time within which this act could be performed. The act in this view it is claimed should be regarded as affecting the legal rights of citizens as between themselves. Would a statute which cut down the right to commence an action from a period without limitation, to a period of seven weeks and five days from the passage of the act, give a reasonable time to a plaintiff in which to commence his action after the enactment of the statute?

The question of what is a reasonable time must be answered in view of all the facts surrounding the passage of the act and of which a court would take judicial notice. The reasonable time is not to be decided with reference to the bare fact as to whether sufficient time were allowed for a swift individual to make out the legal papers and setting out at once, find and serve upon the defendant the process necessary to commence the action.

It is to be noted that in the case of the alteration of a statute as to limitations a claimant must be held to have known not only the law existing at the time of the creation of the liability, but he must be held to have become acquainted with the fact of the passage of a statute which alters that law to his cost. Within what time shall such knowledge be imputed to him and how long a time thereafter would constitute a reasonable time for him to act in? Immediate knowledge, perhaps, ought not to be imputed to him upon such a question. Although knowledge of the law is frequently and for the purposes of justice to be imputed to an individual, yet where the case is one in which to decide what is a reasonable time to

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leave for the commencement of an action upon a cause thereof already accrued, but under the law as altered, the question as to when knowledge of the passage of the act effecting the alteration should be imputed to the citizen is one of the factors in deciding the general question. This question of reasonable time cannot of course form the subject of an inquiry in the case of each individual to be affected by the alteration of the law. It must be decided by the court as a question of law and upon a general consideration of all facts in regard to which courts will take judicial notice. Before answering the question in this case it will be well to examine what has been said by other courts upon the matter, even though the express point has not been actually decided in all cases. It will give some idea of the views other judges have taken of the subject. In *Hawkins v. Barney's Lessee* (5 Peters, 457), the act reduced the limitation period from twenty years, under the original Virginia statute, to seven years under the statute of Kentucky, and it was held a valid act. The contention in this case was that Kentucky was bound to continue the same law of limitations so far as regarded the lands which were once under the jurisdiction of Virginia, as obtained in the latter state at the time of the compact between her and Kentucky. This contention was not upheld. The case, although it has been heretofore cited as authority on this point, has as it seems to me very little application.

In *Jackson v. Lamphire* (3 Pet. 280), the act of the legislature of New York (Chap. 51 of the Laws of 1797, passed March 24 of that year) was claimed to be void as impairing the obligation of contracts. It rendered a certain award made by commissioners to quiet the titles to land in Onondaga county, a bar to any action not commenced within three years after the award. The act was held valid in any view considered as an act of limitation as to existing rights or as a Recording Act.

In *Sohn v. Waterson* (17 Wall. 596), the statute gave, as construed by the court, two years from its date in which to commence action upon existing causes of action at the time of its passage, and it was held sufficient.

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In *Call v. Hagger* (8 Mass. 423), an act limiting the commencement of suit to a period of one year subsequent to the passage thereof in cases where a cause of action had already accrued, was thought not to be unreasonable by the court, but the statute was nevertheless construed as inapplicable to a cause of action which had accrued before its passage.

In *Krone v. Krone* (37 Mich. 308), the statute limited the time as to existing causes to one year from its passage, and it was held reasonable.

In *Berry v. Ransdall* (4 Met. [Ky.] 292), it was held that a statute limiting the time to commence action on existing causes of action to thirty days, was unreasonable and invalid.

In *Lewis v. Harbin* (5 B. Mon. [Ky.] 564, 571), the court, per EWING, Ch. J., said that if a statute should limit the right to commence an action upon a cause thereof existing at the time of its passage to five months thereafter, "a time scarcely sufficient to enable even lawyers of the community to learn that such a law had passed, such an enactment would have shocked the moral sense of mankind, as unjust and iniquitous."

Again, in *Pearce's Heirs v. Patton* (7 B. Munroe [Ky.] 162, 168), the same court said that "six months is not the time prescribed for the suit, but seven years, and if it was, we should hardly regard it as a reasonable time to be constitutionally available to bar the remedy as a mere act of limitation."

In *Pereles v. City of Watertown* (6 Biss. 79), HOPKINS, J., who was United States judge for the western district of Wisconsin, held that a limitation of one year from the passage of the act, as applied to existing municipal bonds issued for negotiation in a foreign market, was clearly unreasonable and unconstitutional. The learned judge conceded that, so far as the statute might be applicable to causes of action accruing after the passage of the statute, the legislature had absolute power to fix the time within which an action might be brought, as in such a case he said the parties may be supposed to have contracted with reference to it, but a very different rule was held to apply in regard to statutes of limitation intended to affect existing causes of action, and the learned author (Cooley

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on Constitutional Lim. [5th ed.] 451), says statutes of this kind must allow a reasonable time, and if the period is manifestly too short, the courts will hold the statute invalid, as in such case constituting a denial of justice.

In our own court, the case of *Rexford v. Knight* was decided in 1854, and reported in 11 N. Y. 308. The limitation of one year in the case of a claimant whose land had already been appropriated by the state, in which to exhibit his claim to the canal appraisers for damages, was held sufficient. Judge JOHNSON, in the course of his opinion, said, the court, in order to pronounce the law unconstitutional, must see that the limitation is so short that the unmistakable purpose and effect of the law is to cut off the right of the party, and not merely to limit the time in which he may begin to enforce it.

This language, it must be remembered, is used with relation to a statute which in fact gave a full year from the time of its passage in which to exhibit the claim.

A far different case from the statute under consideration here.

The court will take judicial notice of the fact that there was, in regard to the statutes under consideration in this case, no grave or public exigency in existence which appealed to the legislature, in behalf of the whole people and for the public interests, for the enactment of a statute curtailing, to the shortest possible legal time, the right to commence actions which, up to the passage of the act of 1883, was unlimited.

The case of *Terry v. Anderson* (95 U. S. *supra*) involved such a public exigency, and the time allowed in that case was from March 16, 1869, to January 1, 1870, almost ten months.

In that case, WAIT, Ch. J., in his opinion, admitted that the time was short, but he said the business interests of the active people of the state had been overwhelmed by a calamity common to all, and society demanded that extraordinary efforts should be made to get rid of old embarrassments, and to permit a reorganization upon the basis of the new order of things. Hence, it was held in that case there had not been such an abuse of legislative power as to justify judicial interference.

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It was the case of legislation in one of the southern states after the war, and it was enacted for the purposes above mentioned. Nothing of the kind exists here.

The cases cited are, I think, sufficient to enable us to come to an intelligent opinion regarding legislation of this character as between citizens.

If the curtailment of the right to file a claim is to be regarded as the same in effect as the shortening of a statute of limitation, I think there can be no doubt that in such a case as this an act which leaves a period of less than eight weeks after its passage in which to commence an action which right was before unlimited as to time, would not leave a reasonable time in which to learn of the passage of the statute, elect what course to pursue, and having made the election, to carry out the same.

The subsequent passage of the act of 1884, by which a few days over three months after its passage was permitted to a claimant in which to file his claim, would not of itself, in the case between citizens, provide a reasonable time, and it ought not to be so regarded when viewed in connection with the act of 1883. The latter act would not, as I have said, leave a reasonable time as between citizens, and hence one who had not availed himself of its provisions could not be cut off from his rights under the general statute by an act which gave him but three months thereafter in which to file a claim which, when it accrued, was a right unlimited in time by any statute whatever.

I will assume here that there is no absolute right to sue the state or to file a claim under any law passed by the legislature that may not be cut off by a statute at any time and upon a moment's notice, and hence, when I speak of the time left in which to file a claim and of the rights of the claimant, I do so only upon the assumption that this legislation is to be regarded in the same light for this purpose as if it were the curtailment of the right of a citizen to commence his action against a citizen, and in that case the question would be whether the act left a reasonable time in which to make his

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election and commence his action. I think these acts do not leave it, and hence would be invalid.

If, upon the other hand, we regard the language of the constitutional provision as meaning that the general laws limiting the rights of citizens to commence and maintain similar kinds of actions as between themselves, are to be referred to for the purpose of determining the question of limitation irrespective of the particular legislation affecting the right to file the particular claim as against the state, the same result is arrived at. During the time between the accruing of respondent's cause of action in November, 1879, and the 1st day of July, 1884, the law as between citizens gave six years in which to commence an action upon a claim of this kind after the cause thereof had accrued. At the time when the claimant's right to file his claim was, by the existing law, finally barred, viz., July 1, 1884, but four years and eight months had elapsed, and hence at that time the bar of the statute in regard to citizens as between each other would not attach for one year and four months. After July 1, 1884, there was no tribunal before which the claimant could be heard, and the statute thus deprived him of a year and four months during which he would as between citizens have had the right to commence and maintain this action.

By the general law applicable to citizens between themselves the cause of action of one who has not had six years in which to commence its prosecution is not outlawed, and hence this claim as between such citizens would not be outlawed.

The time within which, by the act of 1884, claims might be filed in the Board of Claims is merely of statutory authority, and could be lengthened by subsequent authority of the same nature. The only constitutional provision is that which forbids the auditing or allowance of any claim which as between citizens of the state would be barred by lapse of time. The legislature, therefore, had the right to enlarge the time within which the claim might be filed in any particular case, provided it did not itself audit, or permit any other body to audit or allow a claim which as between citizens was already outlawed. (*Cole v. State*, 102 N. Y. 48, 53.)

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The claim of the respondent was not outlawed at the time of the passage of the act of 1888, but from July 1, 1884, up to the passage of that act there was no tribunal to hear the claim, because the legislature had so enacted. By the passage of the act of 1888, the prohibition as to the filing of the claim with the Board of Claims was withdrawn, and leave to file it was given. This, as we have seen, the legislature had the power to do, and it exercised it in this case. (*Cole v. State, supra.*)

Our conclusion is that by either construction of the language of the constitution the act of 1888 was a valid act and authorized the Board of Claims to hear and decide upon the claim of the respondent. It is unnecessary to here decide which is the true construction.

The right to award interest upon this claim is also attacked by counsel for the state.

We think the board did not overstep its jurisdiction or commit any error in awarding it. The claim was one which, in its nature, would bear interest from the time when it accrued, and it was proper for the board to award it.

It is also objected that the claim is part of a whole one which could not be split up, and that the first proceedings by mandamus for the payment of the printing done at the first session of the legislature is a bar to the presentation of this claim. The mandamus proceedings were taken before the work under this claim was commenced. They related to the printing done at the first legislative session under the contract, while this claim relates to that which was done at the second session under the same contract. They were so far separate that payment for the work done in the first session could properly be collected before the commencement of the work in the second session, and I do not think that the collection of the money by legal proceedings for the first session's work, constituted a bar to the collection of the money in payment for that which was done for the second session.

While this claim is spoken of as a stale one, we think the record shows that it is not of that character. Although no

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steps were taken towards filing and presenting it to the State board of audit while that board was in existence, or to the Board of Claims which succeeded it, until a time subsequent to the passage of the act of 1888, yet it appears the claimant was not in any respect sleeping upon his rights during that time. For most of that period he was engaged in trying to collect it by proceedings by mandamus against the comptroller, and much of the delay in its prosecution was caused by the non-action of the courts under circumstances which the claimant was powerless to prevent or control.

There is substantially no defense upon the merits under our construction of the meaning of the contract. The work was done, as alleged, and at prices mentioned and provided for in the contract, and the state has had the benefit of it but has never paid for it.

We have looked at all the other questions raised by the learned counsel for the state, but we think that no error prejudicial to the state has occurred in their decision.

We are, therefore, of the opinion that the award of the Board of Claims should be affirmed, with costs.

All concur, except O'BRIEN and MAYNARD, JJ., not sitting.
Award affirmed.

JOHN BROWN et al. Respondents, v. ANN E. CHUBB et al.,
Appellants.

Where a conveyance is constructively, but not actually, fraudulent as against the creditors of the grantor, the grantee may hold the land as security for a debt honestly due him.

In an action by plaintiffs, who were judgment creditors of T., to reach and appropriate to the payment of their judgment certain real estate purchased by T. and by him procured to be conveyed to C., his daughter, the court found that the conveyance was procured by T. in contemplation of insolvency and with intent to defraud creditors; and that he furnished the consideration paid for the property, but that the grantee was free from fraud in the transaction; that about two months after the transfer a judgment was recovered against T., an execution issued thereon and returned unsatisfied, and subsequently said judgment was transferred to C. for a valuable consideration. Plaintiffs' judgments were

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recovered about a year afterwards. A judgment was rendered directing the property to be transferred to a receiver, the proceeds to be applied in satisfaction of plaintiffs' judgment, in disregard of C.'s right as a judgment creditor. *Held*, error; that while under the statute (1 R. S. 728, §§ 51, 52) the property in the hands of C. was charged with a trust in favor of T.'s creditors, she being a judgment creditor as well as the grantee was both trustee and *cestui que trust*; that plaintiffs by bringing their action acquired no superior rights or equities; that conceding the rule giving to the vigilant creditor the fruits of his vigilance by recognizing the priority of his lien was applicable, it was satisfied and such priority secured by the union in C. of both the title to the property and to the prior judgment, with all legal remedies for its collection exhausted; that she having title and possession was not required to bring an action which would be substantially against herself in order to preserve her claim as a judgment creditor.

(Argued June 1, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which modified and affirmed as modified an interlocutory judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

H. C. M. Ingraham for appellants. It was a condition precedent to this action that the plaintiffs should have recovered valid judgments against the defendant Joseph H. Townsend. (*Reubens v. Joel*, 13 N. Y. 488; *Bishop v. Halsey*, 3 Abb. Pr. 400; *Cropsey v. McKinney*, 30 Barb. 47; *Noble v. Holmes*, 5 Hill, 194; *Van Etten v. Hurst*, 6 id. 311; *O. N. Bank v. Olcott*, 46 N. Y. 12.) The plaintiffs failed to obtain such judgments. (Code Civ. Pro. § 440; *Hallett v. Righters*, 13 How. Pr. 43; *Brisbane v. Peabody*, 3 id. 109; *Kendall v. Washburn*, 14 id. 380; *Titus v. Reylea*, 16 id. 371; *Cook v. Farren*, 34 Barb. 95; *Wortman v. Wortman*, 17 Abb. Pr. 66; *Rawdon v. Corbin*, 3 How. Pr. 416; Code Civ. Pro. §§ 438, 439; *Towsly v. McDonald*, 32 Barb. 604; *Vernam v. Holbrook*, 5 How. 3.) Sections 51 and 52 of 1 Revised Statutes 728, cannot be invoked in aid of the

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plaintiffs in this action. (*Niver v. Crane*, 98 N. Y. 40.) The court erred in refusing to find as requested "that if said premises conveyed by Beal to Chubb should be applied or subject to the payment of the debts of the defendant Joseph H. Townsend they should be first used for the payment of said judgment recovered by John Morton and others," and also in refusing to find as requested regarding the rents. (*Loos v. Wilkinson*, 113 N. Y. 485; *Wood v. Hunt*, 38 Barb. 302.) The trust resulting under section 52 of 1 Revised Statutes, 728, is in behalf of all the creditors in the order of priority of their judgment claims. (*O. N. Bank v. Olcott*, 46 N. Y. 12; *C. C. Bank v. Risley*, 19 id. 369; *Murphy v. Briggs*, 89 id. 452; *Wood v. Robinson*, 22 id. 564.) If the Morton judgment is not a first claim upon the Bergen street property for its full amount, yet it should be regarded as such to the extent of \$4,000, the amount which Mrs. Chubb paid therefor. (*Murry v. Briggs*, 89 N. Y. 446; *Seymour v. Wilson*, 19 id. 417; *Loos v. Wilkinson*, 113 id. 485.)

Josiah T. Marean for respondents. The judgments against Townsend, upon which the action is based, were valid. (Code Civ. Pro. §§ 438, 439.) When the conveyance was made by Beal and wife to defendant Chubb, a trust resulted in favor of the creditors of Townsend to the extent necessary to satisfy their just demands. (1 R. S. 728, §§ 51, 52; *Wood v. Robinson*, 22 N. Y. 564; *McCartney v. Bostwick*, 32 id. 53; *Baker v. Bliss*, 39 id. 70; *O. N. Bank v. Olcott*, 46 id. 12.) By virtue of the commencement of this action plaintiffs acquired a lien upon the real property conveyed by Beal and wife to defendant Chubb, and upon the rents of the same received by her. (*Edmeston v. Lyde*, 1 Paige, 637; *Boynton v. Rawson*, Clarke, 584; *Fitch v. Smith*, 10 Paige, 9; *Safford v. Douglas*, 4 Edw. 537; *Storm v. Waddell*, 2 Sand. Ch. 494; *Corning v. White*, 2 Paige, 567; *Warden v. Browning*, 12 Hun, 497; *Loos v. Wilkinson*, 110 N. Y. 195; *Niver v. Crane*, 98 id. 46.)

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O'BRIEN, J. The plaintiffs were judgment creditors of one Joseph H. Townsend, and brought this action to reach and appropriate to the payment of their judgments certain real estate in Bergen street, in the city of Brooklyn, which was conveyed on December 1, 1883, by one Beals to the defendant Ann E. Chubb, who is the daughter of the judgment debtor, who paid to Beals the consideration of the conveyance. It has been found that the judgment debtor procured this conveyance to be made to his daughter, in contemplation of insolvency, and with intent to defraud creditors, and that he furnished the consideration for the purpose of avoiding the payment of his just debts, but that the daughter and grantee of the property was free from all fraud in the transaction. The latter fact is a most significant one, and raises the only question which we think is open to us on this appeal. It has also been found that on January 26, 1884, one Morton recovered a judgment against Townsend for \$6,117.83, which was docketed in Kings county on that day, and on the same day an execution was issued on this judgment, and subsequently returned unsatisfied; and that on March 13, 1884, Morton, for a valuable consideration, assigned the judgment to the defendant Mrs. Chubb. This judgment was recovered and execution issued thereon nearly a year before the recovery of the judgments, which the plaintiffs seek to enforce in this action. It appears, therefore, that the judgment debtor never had the title to the real estate in question, but that before the plaintiffs recovered any judgment, or were entitled to proceed against this real estate, the title had become vested in his daughter, who had also become clothed with all the rights of a judgment creditor of her father, without participation in any fraud. Neither the plaintiffs' judgments nor that recovered by Morton ever became a lien on the real estate conveyed to Mrs. Chubb, in the sense that it could be sold upon execution. (*Garfield v. Hatmaker*, 15 N. Y. 475.) The remedy of Townsend's creditors as to this land was in equity, under the provisions of the statute that the title in such cases shall vest in the grantee named in the conveyance, subject to a resulting

trust in favor of the creditors of the person paying the consideration. (1 R. S. 728, §§ 51, 52.)

The trial court held that by virtue of the commencement of this action the plaintiffs acquired a lien upon the property and the rents thereof in the hands of Mrs. Chubb, and that the same were equitable assets of the debtor. The judgment directed her to convey the property to a receiver, appointed by the court, and the receiver to sell the same and apply the proceeds to the payment of the liens thereon, in the order of their priority; that the defendant Mrs. Chubb account to and pay over to the receiver the rents received by her, to be applied to the same purpose. The judgment does not indicate very clearly what is meant by the priority of liens, but it necessarily postpones the Morton judgment, in the hands of the person who has the legal title to the property, till after the satisfaction of the plaintiff's judgment, which, as we have seen, are subsequent in point of time. The legal effect of the decision is made clearer by reference to certain requests made by the defendant Mrs. Chubb, as follows: 1. That if the real estate was subject to be applied to the payment of Townsend's debts, then it should be first used for the payment of the Morton judgment. 2. That if the rents were subject to be so applied, they should first be used to satisfy the same judgment.

The trial court refused to so hold, and counsel for the defendant, Mrs. Chubb, excepted.

The General Term affirmed the judgment with a modification to the effect that she should be credited, in the accounting, with such sums as she had paid since she went into possession of the property, for taxes, interest on incumbrances, repairs, and any other necessary expenses for the preservation and maintenance of the same.

The question is whether, according to the course and practice of equity, the title to this property can be transferred to a receiver in disregard of the rights of Mrs. Chubb as a creditor, for that is practically what the judgment does. The defendant holds the legal title subject to a resulting trust in favor of the creditors of her father. But she is herself one of them,

and the oldest in point of time. There is united in her the legal title to the property, and the ownership of the first of the judgments for the payment of which the statute declares the trust. She is both trustee and *cestui que trust*. Her position as a creditor is not recognized by the judgment in this case, for the receiver is directed, from the proceeds of the sale of the property, to pay to plaintiffs their costs of this action, then the entire amount of their claims with interest, and to deposit the balance, if any, with the county treasurer, subject to the order of the court. The principle at the bottom of this decision must be either that Mrs. Chubb, for some reason, is not entitled to share at all in the proceeds of the sale or that the plaintiffs, by reason of the commencement of this action, have acquired, in equity, a right to the proceeds, prior and superior to that of the person holding both the title to the property and the older judgment. The learned counsel for the plaintiffs on the argument concedes certain rights to the defendant which are not expressed in the finding or judgment under review. He says that the innocence of the trustee personally of fraud simply avoids a *disability* as creditor to acquire a preference and enables her, as holder of the Morton judgment to enter the race on equal terms with other creditors, but that her innocence constitutes no affirmative merit for any purpose. This is a concession that, before this action was commenced, the Morton judgment occupied at least as favorable a position, with respect to the equitable assets represented by this property, as any other judgment. While admitting this he argues that these plaintiffs, by the exercise of that superior diligence in bringing this action, which is sometimes recognized in equity as a ground of preference, in the absence of other controlling circumstances, have acquired the prior right to the assets. We think that this contention cannot be sustained. The courts have apparently determined the priority of liens in this class of cases in accordance with the rule that prevails in analogous cases where the title and conveyance of the property sought to be reached in the action has proceeded directly from the fraudulent debtor himself. *Wood v. Robin-*

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son, 22 N. Y. 564; *Murphey v. Briggs*, 89 id. 452.) In the case last cited the court, in explaining the judgment in *Wood v. Robinson*, said: "It appears that the plaintiff was a prior judgment creditor, and hence he had a prior equity which entitled him to a preference at the time of the conveyance to the wife of real estate paid for by the husband." In the case of *Ocean National Bank v. Olcott* (46 N. Y. 12), a judgment creditor sought to reach equitable assets of the debtor of this character, and CHURCH, Ch. J., said: "A trust results, not of the whole property, but only to satisfy the just claims of creditors: not of one creditor only, but of all creditors. * * * Hence the fifty-second section was adopted which placed the property in the same relation to creditors as it would have been if the debtor himself had fraudulently transferred it." On a bill filed to reach real property fraudulently transferred by the debtor, the claims of several creditors are satisfied in the order of the priority of the judgment. (*Chautauqua Co. Bank v. Risley*, 19 N. Y. 369.)

But if the question was to be determined irrespective of authority and upon the general principles of equity which secures to a vigilant creditor the fruits of his diligence, by recognizing the priority of his lien, that rule was satisfied and such priority secured, by the union in Mrs. Chubb, of both the title to the assets and the prior judgment with all legal remedies for its collection exhausted. The argument for the plaintiffs admits that had she then brought an action to appropriate the property to the payment of the judgment she would have obtained the prior lien. But as she had the title to the property and was in possession and enjoyment of it, and at the same time the owner of the judgment such an action, which would be substantially a suit against herself, would seem to be an idle ceremony. On this state of facts she might well have assumed that a court of equity would refuse to disturb her title or possession until all of her just claims were paid, the title having come to her through the act of the person who was bound to pay her judgment, without any fraud on her part. She had nearly a year before

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the plaintiff recovered their judgments, advanced her money to take up an existing judgment against her father and at least to the extent of the sum advanced, she replaced the money diverted by him from his creditors when he paid the consideration of the conveyance to her. She was at that moment in receipt of the rents and profits as owner, and I am unable to see why every right that she could ever assert as a creditor did not then attach to the land and the rents in her hands as completely as if, without any of these advantages, she had brought an action. This court has recognized the principle decided in *Lobstein v. Lehn* (120 Ill. 549), that the grantee of lands under a conveyance constructively but not actually fraudulent may hold the land as security for a debt honestly due him. (*Loos v. Wilkinson*, 113 N. Y. 491.)

We are not aware of any rule that would justify junior judgment creditors in disturbing the title or possession of the defendant as to this property, without first paying or offering to pay her judgment. The filing of a bill by her to reach the property could not, in equity, place her in any stronger position. If the property in question had been conveyed by Beals to Morton, by direction of the debtor, under the same circumstances and with like intent on the part of the debtor, before the assignment of the judgment to Mrs. Chubb, equity would treat his lien as paramount and his assignee, without fraud, has succeeded to all of his rights at law or in equity. For these reasons the judgment of the General and Special Term should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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GUSTAVE A. KIRCHNER, Appellant, v. THE NEW HOME
SEWING MACHINE COMPANY, Respondent.

Where a release is general in its terms and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol; the instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress or some like cause. So, also, if the words of a release fairly import a general discharge, their effect may not be limited so as to exclude a demand simply upon proof that at the time of its execution the releasor had no knowledge of the existence of the demand.

It seems, however, when a general release is pleaded as an affirmative defense to a cause of action, plaintiff may show that by a mutual mistake of the parties, or a mistake on his part and fraud on the part of defendant, the cause of action was included in the release, contrary to the agreement and intent of the parties, or in case of fraud, contrary to his intent.

It seems, also, that the intentional concealment by the releasee of a cause of action existing in favor of the releasor, of which he was ignorant, will be sufficient to estop the former from insisting upon any advantage to be derived from the mistake of the latter.

In an action by plaintiff, who had been defendant's agent in the sale of sewing machines, to recover damages for a forcible eviction from his store and detention of the premises from him, and for injuries to his property in the store, defendant proved and gave in evidence a general release, under seal, executed by plaintiff after the cause of action arose, absolving the defendant from all liability for any demand or cause of action which plaintiff might have against it, either upon contracts or in tort, and especially for all trespasses committed by it or damages for which it might be responsible to plaintiff. At the end of the release was a provision to the effect that it was understood between the parties that plaintiff should not interfere in any manner with any sales of sewing machines theretofore made by him for defendant, or with collections thereon. Plaintiff claimed that part of the consideration of his release was the restoration to him of his store and property and that he then had no knowledge that any of the property had been injured, destroyed or disposed of by defendant. There was evidence showing the existence of various controversies and litigations between the parties at the time the release was executed, and tending to show that it was not the intention to include in the release the cause of action sued upon. The court charged that the release would not be allowed to operate upon any right of action not covered by the particular clause and not mentioned in the preliminary discussions which led up to the release; also, that it did not cut off plaintiff's right to

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recover for any injury to him or his property not known to him at the time of its execution. *Held*, error.

The distinction in the rule as to the availability of parol evidence to contradict or modify the instrument, applicable to releases and that applied to receipts pointed out.

(Argued June 1, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial, and also affirmed an order denying a motion for treble damages.

This action was brought to recover damages for certain alleged trespasses.

George S. Hamlin for appellant. The court erred in its charge to the jury in respect to the release. (*Stearns v. Tappin*, 5 Duer, 294; *McCrea v. Purmont*, 16 Wend. 473; *Acker v. Phoenix*, 4 Paige, 307.) Even assuming that there was evidence of mistake on the part of the plaintiff, it cannot avail to sustain the judgment in this case. (*Lyman v. U. Ins. Co.*, 17 Johns. 377; *Nevius v. Dunlap*, 33 N. Y. 680; *Mead v. F. Ins. Co.*, 64 id. 455; *Ford v. Joyce*, 78 id. 618; *Bispham's Prin. of Equity* [2d ed.], 247; *Kerr on Fraud & Mistake*, 407; *Penny v. Martin*, 4 Johns. Ch. 566.) Even if evidence of fraud or mistake existed, it would not be available for another reason. The plaintiff did not restore, or offer to restore, what he received as a consideration for the release. (*Gould v. Nat. Bank*, 86 N. Y. 79; *Thayer v. Turner*, 8 Metc. 550; *Cobb v. Hatfield*, 46 N. Y. 533; *McMichael v. Kelmer*, 76 id. 36.)

M. L. Towne for respondent. The original taking was wrongful. (*Castle v. Noyes*, 11 N. Y. 329.) The release was ineffectual against wrongs of which plaintiff was ignorant at the time of its execution. (*Lyman v. Clarke*, 9 Mass. 235; *Farewell v. Coker*, 2 Merr. 353; *Post v. E. Ins. Co.*, 43 Barb.

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353; *Butcher v. Butcher*, 4 B. & P. 113; *Wright v. Russel*, 2 Wills. 350; *Cole v. Knight*, 3 Mod. 277; *Barelay v. Lucas*, 1 D. & E. 291; *Miller v. Craig*, 6 Beav. 433; *Lindo v. Lindo*, 1 id. 496; *Turner v. Turner*, L. R. [14 Ch. Div.] 829; *Mumford v. Murray*, 6 Johns. Ch. 452; 39 N. Y. 202; 64 Barb. 608; *Parsons v. Hughes*, 9 Paige, 591.) The rule that a release cannot be relieved against unless the releasee shares the mistake, is applicable only when the party claiming a literal fulfillment is honest. (*Welles v. Yates*, 44 N. Y. 528, 529.)

MAYNARD, J. The plaintiff alleges, as the grounds of his cause of action, a forcible eviction by the defendant from premises occupied by him as a store, at 282 Grand street, Brooklyn, December 3, 1887, and a forcible detention of the premises from him until February 8, 1888, and the injury to his stock of goods, fixtures, machinery, and other personal property in the store at the time defendant took possession, which were either removed, destroyed, or seriously damaged by the acts of the officers and agents of the defendant. He also claims that his business was broken up by this unlawful interference by the defendant.

The plaintiff gave evidence tending to establish these various grounds of recovery. The defendant denied the commission of the trespasses, and set up as an affirmative defense and proved upon the trial a general release under seal executed and acknowledged by the plaintiff February 8, 1888. This instrument in terms absolved the defendant from all liability for any demand or cause of action which the plaintiff might have against it, either upon contract or in tort, and especially for all trespasses committed by it, or damages for which it might be responsible to the plaintiff. The cause of action in suit here then existed, and the release was, upon its face, sufficiently comprehensive to include it within the scope of its operation.

It contained at the end a special provision to the effect that it was understood between the parties that the plaintiff should not interfere in any manner with any sales of sewing machines

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theretofore made by him for the defendant, nor with the collection of any amounts due on such machines.

One of the points in controversy between the parties was the right of the plaintiff to control such sales and make the collections. When the release was executed the plaintiff had claims against the defendant amounting to \$2,500 for services rendered and for sums due him for sewing machines sold, the proceeds of which had been collected or received by the defendant. The defendant had claims against the plaintiff amounting to \$2,300, and a bill of sale of a part of the property in the store to secure upwards of \$1,000 of this indebtedness. There was also an action pending in the City Court brought by the plaintiff against the defendant in October, 1887, for an accounting in which he claimed that the defendant owed him \$940, after liquidating his indebtedness to it; and in this action he sought to have the defendant perpetually restrained from interfering with the personal property; the bill of sale canceled; and a reconveyance directed to him. A preliminary injunction order had been granted in the action, and a proceeding was then pending to punish the defendant for a contempt of court in violating it. There had been a long and bitter contention between the parties and the defendant had repeatedly caused the arrest of the plaintiff upon criminal charges; which had, invariably, been dismissed as not sustained; and it is to be inferred from the evidence, that there was then pending in some court an action brought by the plaintiff to recover damages for false imprisonment or malicious prosecution, because of these groundless criminal proceedings.

As one of the considerations of the release by the plaintiff to the defendant, the latter contemporaneously executed a like general release to the plaintiff.

The plaintiff also claims that a part of the consideration of his release, was the restoration to him of his store and personal property, and that he then had no knowledge that any of the property had been injured, destroyed, or disposed of by the defendant. He had been forcibly evicted and kept out of

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possession of the store where the property was, by the defendant's agents, and while he had obtained judgment against them in a proceeding for forcible entry and detainer in the police court, they had procured from the landlord the execution of a new lease to another employe, and he was thus prevented from entering upon the premises and ascertaining the condition of the personal property. He expected when he regained possession of it, upon the execution of the release, to find it all still in the store and in as good order as when the defendant unlawfully seized it.

It is unnecessary to go further into the details of the voluminous proofs in the record, except to note, that there is evidence, which tends to show that the plaintiff did not intend to discharge the cause of action upon which this suit was brought, and that the defendant's officers and agents did not intend to include it in the release; or, if they did, that they concealed such intention from the plaintiff, and also concealed from him the condition of the personal property; and that the plaintiff understood that the release only embraced the actions then pending; and that the defendant knew that such was his understanding of its contents and effect.

The trial court following the opinion of the General Term upon a former appeal (59 Hun, 186) charged the jury, that if the only subject of negotiation between the parties was the release by the plaintiff of his rights under the action in the City Court and his claim for false imprisonment, then the general terms of the release would not be allowed to operate upon any right of action, which was not covered by the particular clause, and was not mentioned in the preliminary discussion that led up to the release. This proposition we think does not correctly state the law applicable to this branch of the case.

What is here denominated "the particular clause" apparently has reference to the concluding paragraph of the instrument which, as we have seen, is a declaration that the plaintiff shall not interfere with certain sales which had been made, or the collections on account of them.

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It is undoubtedly true that the whole of a release must be considered in construing its provisions, and, if it is general in its terms, it may be controlled and limited in its effects by the limitation in the recital. (2 Parsons on Cont. [6th ed.] 714.)

The rule is very clearly stated by the court in *Jackson v. Stackhouse* (1 Cow. 126): "It is well settled that where there are general words alone in a deed of release they shall be taken most strongly against the releasor; but where there is a particular recital, and then general words follow, the general words shall be qualified by the particular recital." The reason is obvious. The recital is presumed to express the intention of the parties as to the scope of the deed, and if other matters are intended to be included specific language must be used declaratory of such intent.

There are no recitals or particular words in this release to which its application can be restricted. It would be difficult to make it more general or sweeping in all its parts. It is a comprehensive discharge of every liability of the defendant, by whatever name known, arising "by reason of any matter, cause or thing whatsoever from the beginning of the world" to the date of the instrument. The final clause with reference to the sales and collections is not properly a part of the release. It is more of the nature of a covenant to refrain from the doing of certain specified acts, and it is manifest that the parties never intended to restrict the effect of the writing in such a way as to entirely destroy its character as a release. To so construe it would render its most important provisions meaningless and inoperative. It would not even bar the plaintiff's further prosecution of the suits in the City Court and for false imprisonment, and he concedes that they were intended to be included.

Nor was the effect of the release necessarily limited to the subjects considered in the preliminary discussion that led up to it. If the parties intentionally embraced in the instrument demands not previously suggested or all subsisting causes of action when only certain of them had been discussed, it would be operative according to its terms and unassailable. Releases

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and other deeds and written contracts do not differ in this respect. All preliminary negotiations are presumed to be merged in them, and from the time of their execution they must be deemed to be the only competent evidence of the agreement of the parties upon the subjects to which they relate unless avoided for fraud, mistake, duress or some like cause. In *Parsons on Contracts* the rule is stated to be (2 vol. [6th ed.] 715): "If a plaintiff is met by a general release under his seal to the defendant, he cannot set up an exception by parol." In the early case of *Pierson v. Hooker* (3 John. 68) the release was "of and from all debts and demands of every nature and kind whatsoever," and evidence was offered and excluded at the trial to show that at the time of its execution it was not intended to include the demand in suit, and Chief Justice KENT held the ruling correct, saying (p. 70): "The instrument is general and comprehensive, and expressly reaches to every debt and demand of every kind. To show by parol proof that it was not so intended, is to contradict or explain away the instrument, which is contrary to the established rule of law." There is just here a wide difference between a receipt and a release, and whatever confusion there may be in the authorities upon this point has resulted from a failure to observe the distinction.

The trial judge, upon the request of the plaintiff, and, as he states, under the decision of the General Term, also charged the jury that the release did not cut off the plaintiff's right to recover for any injury to him or his property, of which he did not know at the time he signed it. For the same reasons we think this direction was erroneous. It is competent for a party by his own act to forego a recovery for unknown as well as known causes of action. Construing the language of a release, as we must, most strongly against the grantor, if words are used fairly importing a general discharge, their effect cannot be limited by the bare proof that the releasor had no knowledge of the existence of the demand in controversy. The operation of such an instrument cannot be made to depend upon oral testimony as to the knowledge of the creditor when he executed

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it of the liability which he subsequently seeks to enforce. It might happen that he did not then know or recollect that his debtor owed him anything, and the writing under such a construction, would be wholly inoperative, although many causes of action may have at the time actually existed.

While there must be a reversal of the judgment, it does not follow that this release is conclusive or unavoidable. It has been set up and proven as an affirmative defense, and the plaintiff, under section 522 of the Code, is to be deemed to have controverted the defense by traverse or avoidance, as the case may require, and he may have the benefit of whatever evidence he can produce, to sustain such traverse or avoidance. (*Meyer v. Lathrop*, 73 N. Y. 315.)

If the plaintiff can show that by a mutual mistake of the parties, or by what is its equivalent, a mistake on his part and fraud on the part of his adversary, the present cause of action is embraced in the release, contrary to the intent of the parties, or contrary to his intent in case fraud is proven, he is entitled to an instruction to the jury to the effect that the release does not bar his right to recover.

Generally speaking, whatever proofs would be regarded as sufficient to enable the plaintiff to maintain an action for the reformation of the release, so as to except from its provisions the demand in suit, would be available to him in this action by way of avoidance of its terms. There are numerous cases in this court determining when such an action will lie and what evidence is required to support it. (*Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Maher v. Hibernia Ins. Co.*, 67 id. 283; *Paine v. Jones*, 75 id. 593; *Kilmer v. Smith*, 77 id. 226; *Smith v. Truflow*, 84 id. 661; *Albany City Sav. Bk. v. Burdick*, 87 id. 40.)

Upon such an issue evidence of the preliminary negotiations of the parties, and of the ignorance of the plaintiff of the injury to his property is important. The fraud of the defendant may have been purely passive. An intentional concealment by its officers and agents of the purport of the instrument, or of the destruction of or injury to plaintiff's prop-

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erty, which he was seeking by means of the settlement and release to regain, or an omission to inform him of his mistake, if they perceived that he was in error as to its provisions, would be sufficient to estop the defendant from insisting upon any advantage to be derived from the mistake of the plaintiff.

This is not the case of an attempted rescission of a contract, upon the ground of fraud and the plaintiff is not, therefore, under any obligation to return what he has received, or to tender restoration. He is not seeking to disaffirm the agreement actually made, but merely objecting to the application of the written evidence of it to a subject which the parties did not intend to include in it. (*Wells v. Yates*, 44 N. Y. 531.)

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

JACOB PARMENTER, Respondent, v. JOHN J. FITZPATRICK,
Impleaded, etc., Appellant.

In an action for conversion, the market price of the property is ordinarily the measure of its value.

It is not necessary to prove any particular number of sales in order to establish the market value.

Proof of the price obtained at an actual *bona fide* sale of the property fairly conducted and not forced, whether at auction or private sale, is competent upon the question of such value.

In an action against a sheriff for the alleged unlawful levy upon and sale at Plattsburgh of a stock of goods on execution, it appeared that the greater portion of the goods was old shop-worn stock. The goods were mostly purchased in bulk by the judgment creditors, who sent portions of them to Syracuse and to Utica for sale, and they were there sold. Defendant offered to prove on trial that the purchasers used their best endeavors to sell the goods to the best advantage, and that the sales realized a price stated, also that the entire stock so bid off was sold at the best price which could be realized, which was less than that for which they were bid off. This was objected to and excluded. *Held*, error.

(Argued June 2, 1892; decided October 4, 1892.)

135	190
144	565
185	190
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135	190
78	AD148

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the May term, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John E. Smith for appellant. The plaintiff's acts in attempting to take possession of the stock of goods on the fifth of April, after the defendant, as sheriff, had levied upon that stock on March twenty-first, by virtue of an execution issued upon the judgment in favor of Morse & Lyon for seventy-six dollars and twenty-seven cents, and what the plaintiff said and did on April nineteenth, when, it is alleged, that he tendered the defendant the amount of that execution, did not entitle him to the possession of this stock of goods. (Code Civ. Pro. §§ 992, 1409; *Osborne v. Alexander*, 40 Hun, 323; *Slade v. Van Vecton*, 11 Paige, 21; *Van Winkle v. Udall*, 1 Hill, 559; *Wheeler v. Smith*, 11 Barb. 345; *Williams v. Rogers*, 5 Johns. 163; *Noyse v. Wycoff*, 114 N. Y. 204.) The court erred in not charging "that if the plaintiff left Smith in possession and control of the property, to give him credit from appearances, of being the owner of the stock, then he was guilty of a fraud against creditors." (*Preston v. Southwick*, 115 N. Y. 139-150; *Blamt v. Gobler*, 77 id. 461; *Robinson v. Elliott*, 22 Wall. 524; *Brockett v. Harvey*, 91 N. Y. 214, 221; Bump on Fraud. Con. 332; *Smith v. Lowell*, 6 N. H. 67; *Paul v. Crooker*, 8 id. 288; *Smith v. McDonald*, 25 Ga. 377.) The paper of April 2, 1888, was given as a security; although in form of a bill of sale, it appears quite clearly from the evidence that in fact it was only a chattel mortgage, and not being filed, was absolutely void. (*Dutcher v. Smartwood*, 15 Hun, 31; 86 N. Y. 339; *Parshall v. Eggert*, 54 id. 18; 127 id. 639.) If the trial court was correct in submitting to the jury the question of the nature of the instrument of April second,

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that is, as to whether it was intended as an absolute bill of sale, or in the nature of a chattel mortgage, then it is void as to these defendants, for fraud. (4 R. S. [8th ed.] 2591, §§ 5, 6; *Dutcher v. Smartwood*, 15 Hun, 31; *Stimson v. Wrigley*, 86 N. Y. 332.) When improper testimony has been admitted in evidence, unless the court can say that the jury were not influenced by it, and that it could not by any possibility have effected the verdict, a new trial will be ordered. (*Waring v. U. S. T. Co.*, 4 Daly, 233; *In re Smith*, 95 N. Y. 516; *Clark v. Vorce*, 19 Wend. 233; *Andrews v. R. & W. R. R. Co.*, 54 N. Y. 341; *Williams v. Fitch*, 18 id. 546; *Campbell v. Woodworth*, 20 id. 499; *Crouse v. Fitch*, 1 Abb. Ct. App. Dec. 475; *Wells v. Kelsey*, 37 N. Y. 143, 146, 147; *Harrison v. Glover*, 72 id. 451; *Hoffman v. Conner*, 76 id. 121; *Jones v. Morgan*, 90 id. 4; *Holcomb v. Holcomb*, 20 Hun, 157; *Hobert v. Hobert*, 62 N. Y. 80; *Foster v. Burke*, 78 id. 155.)

T. F. Conway for respondent. There being evidence to support the verdict as to each of the facts, the finding of the jury is conclusive and should not be disturbed, it being "an intendment of law that the verdict settled in favor of the prevailing party every question of fact litigated upon the trial." (*Wolf v. Goodhue*, 43 Barb. 400; 41 N. Y. 620.) The evidence establishes that the instrument under which the plaintiff claims title to the property in question was an absolute bill of sale. (*Blant v. Gabler*, 77 N. Y. 461; *Brown v. Guthrie*, 110 id. 435; *Bumper v. Rushmore*, 79 id. 19; *Cleveland v. N. J. S. Co.*, 25 id. 666; Code Civ. Pro. § 1409; *Stewart v. Beal*, 7 Hun, 405.) Plaintiff was a purchaser for value. But the defendant, having seized the property under execution, is not in that situation. The plaintiff, by assuming to pay notes on which he was only liable as indorser for his vendors, who were the makers, thereby became principal debtor instead of surety, and a purchaser in good faith and for value. (*Williams v. Shelley*, 37 N. Y. 375; *Miller v. Lockwood*, 32 id. 293; *More v. Holland*, 4

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Den. 264.) Defendant's claim that he was entitled to possession of all the property sued for because, before plaintiff acquired title, he had made a levy thereon under an execution issued on a small judgment of about \$76 against plaintiff's vendors is not sustained by the evidence and does not avail him. (*Tiffany v. St. John*, 65 N. Y. 320; *Halpin v. P. Ins. Co.*, 118 id. 166; 2 John. Ch. 172; *Courtright v. Cadby*, 21 N. Y. 366; *Edwards v. Reynolds*, H. & D. Supp. 53; *Baker v. Rand*, 13 Barb. 152; 2 Johns. 442.) A new trial should not be granted because the damages were excessive, as the evidence shows that the property was worth more than the amount of the verdict. (*Peck v. N. Y. C. R. R. Co.*, 8 Hun, 289.) There are no exceptions in the case by the defendant to the rulings or charge of the court, or to the admission or rejection of evidence that would justify the reversal of the judgment. (*Harris v. Panama R. R. Co.*, 48 N. Y. 661; *Wells v. Kelsey*, 37 id. 143-145; *Mott v. Kipp*, 10 Johns. 478; *Westerville v. Smith*, 2 Duer. 460; *Benjamin v. Smith*, 4 Wend. 324; *Hotchkiss v. G. F. Ins. Co.*, 5 Hun, 98; 1 Greenl. on Ev., § 449; *Stevens v. Rodger*, 25 Hun, 54.)

PECKHAM, J. The plaintiff commenced this action to recover from the defendant, who was the sheriff of the county of Clinton, the value of certain goods levied upon and sold by the defendant as the property of the firm of A. C. Smith & Co., of which property plaintiff claims to have been the owner under a bill of sale from the firm to him. Certain judgment creditors of the firm had issued executions upon their judgments and placed them in the hands of the defendant, as sheriff, and he had levied upon the property and sold it under the execution.

The plaintiff recovered a verdict at Circuit, upon which judgment was entered and an appeal taken therefrom by defendant to the General Term, which court has affirmed the judgment, and from the judgment of affirmance the defendant has appealed to this court.

Some questions were raised upon the trial at the Clinton Circuit in May, 1890, as to the character of the writing under

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which plaintiff claimed title, whether it was an unconditional bill of sale, or intended as a security, and whether it was executed in good faith or fraudulently. These questions were submitted to the jury, and their general verdict for the plaintiff shows they found them in his favor.

Another question was made as to the value of the goods, assuming them to have been the property of the plaintiff at the time of the sale under the executions. The plaintiff alleged the value to have been thirty-five hundred dollars at the time of the conversion on the 19th of April, 1888. The defendant denied that allegation. The jury rendered a verdict of four thousand dollars for the plaintiff, which included interest on the principal sum.

Although the value of the property was thus put in issue, there was not much contradiction as to its character. It consisted of goods in a store in Plattsburgh, in Clinton county, and was described as school and miscellaneous books, papers and envelopes, blank-books and stationer's goods generally, confectionery, albums, bibles, artists' materials, toys, sheet music, musical publications, some small musical instruments, a few gold pens and some pencils. A large portion of it was old stock, the accumulation of years, and but a small portion new or fresh stock; school-books not in use at the time and place, out of date, and a good many of the miscellaneous books damaged by handling. The stock was what would be called shopworn.

The judgment creditors were represented at the sale of these goods under the various executions. Before the sale, their representative had examined them and had come to a general conclusion or opinion as to their value. The sale under these executions resulted in the purchase in bulk of most of the goods by the judgment creditors through their representative. The goods thus purchased were sent, portions of them to Syracuse, and portions to Utica, N. Y.

The defendant upon the trial offered to show that the judgment creditors used their best efforts to sell these goods to the best advantage and at the highest prices they could, and that

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they realized for them several hundred dollars less than the amount bid for them at the public sale already mentioned. The record shows there was an objection to this offer of evidence, but no grounds of objection were stated, and the objection was sustained and an exception taken by defendant.

The defendant then offered to show that the entire stock bid off was subsequently sold at the best price that could be realized and for about eleven hundred dollars (which was considerably less than the amount of the bid already mentioned), and this offer was objected to in the same way and the objection sustained, and the defendant excepted.

The property being of such a nature that sales thereof would not be a frequent occurrence, it is apparent that the basis for proving a market price would be somewhat vague. Yet a market price would be evidence of the value of the goods. Shopworn goods partake somewhat of the character of second-hand goods, and while fresh goods of the same description might be of one value, these goods would naturally be of less. The facilities for the sale of such property would seem to be as good at a city like Syracuse or Utica as at Plattsburgh. The market price at either of the former places would, therefore, be good evidence of the market price at the latter. The value at each place would probably be about the same. At any rate, there is no evidence to show there was any difference in the value at these different places, and the objection to the evidence offered is not pointed at any such possible ground of distinction, and we are not to assume it under such circumstances.

Nor is there any objection upon the ground of the lapse of time (not more than a year) after the bid at the execution sale. The time would not be sufficient to exclude this evidence in the absence of any fact showing that it had caused any great or noticeable change in the value of this class of goods. The inquiry, therefore, is as to the competency of evidence of the price an article sold for at private sale as bearing upon the question of the value of that property.

The plaintiff claims that the defendant has taken the plaintiff's property from him without legal authority, and if he

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proved it, the defendant must pay him the value thereof. The market price of personal property at the place of conversion is ordinarily the measure of its value. The market price of personal property is nothing but the general or ordinary price for which the property may be bought and sold. There is no particular number of sales necessary to be proved before such price can be said to be established. It seems plain, however, that proof of the price obtained at an actual sale made *bona fide*, and not a sale which was in any way *forced*, would tend in the direction of proving or establishing a market price, and hence would be some evidence of the value of the property sold. It might not, and indeed it is not claimed to be conclusive, but it seems to be competent upon that question. If there were no other evidence upon the subject, it certainly would be sufficient for the jury to base a verdict upon, and if there were other and contradictory evidence, then it should be placed before the jury for its consideration upon the question of value. A market price is simply the result of sales of the same kind of property.

In the ordinary case of purchase and sale of property, the fact that the purchaser and seller have met and agreed upon a price, and actually bought and sold the property at that price, ought to be in the nature of things some evidence of the value of that property, which has thus changed hands in a *bona fide* transaction. Evidence of a sale of the same property at a different place and time from the period of the sale under investigation, may be competent or incompetent, depending, among other things, upon the distance both of place and time, and even upon the stable character of the value of the property itself. A sale of stock at the Stock Exchange in a corporation whose stock was greatly dealt in, for the sole purpose of speculation, would not be much evidence of a market price for the same stock months before or after such sale. The price paid at the sale of a horse six or seven years prior to the time when his value was the subject of investigation, might be regarded as no evidence of his value at such time. And on the contrary, evidence of what property, such

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as the property here in question actually sold for at a comparatively few miles distant from the place of conversion, and within a few months of that time, ought, as it seems to me, to be some evidence of the value of such property at the time and place in question. It is evidence of an actual sale, and on that account tends to show the market price and also the value of the property so sold. The parties selling this property were in the position of most owners wishing to sell and desirous of getting the highest price they could. They had purchased it at a certain price, and any sale below it left them losers, and any sale at a greater sum left them the gainers. These creditors had, as appears, every motive to obtain the best price they could for these goods, and I am unable to see why the price the goods sold for may not be proved as some evidence upon the question of their real value at the time of the conversion. There is no pretense that the small difference in time and place created in this case any difference in the real value of the goods or in the market price thereof. If the goods had been sold at auction within this time and at the place stated, it seems to be assumed that evidence of what prices they brought at such auction sale, would be competent upon the question of value. It is said this is because it has been so decided in this court. It is true that proof of the prices obtained upon sales at auction has been declared by this court as in many cases high evidence of the value of the property thus sold.

But the reason for the admissibility of this kind of evidence does not and cannot rest upon the fact that the sale was by auction, but upon the fact that there was an actual sale, a real transaction between the buyer and seller. The price given and obtained upon such actual occurrence is naturally regarded as some evidence of the value of the thing bought and sold. There is no particular force in the fact that the sale was by auction which tends to prove the value of the thing sold any more than any *bona fide* sale in private. The auction sale itself shows that there was but one bidder who would give the price for which the property was sold. The sale, therefore, is

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only evidence that he alone was willing to pay that price for the property, and that the owner was willing to sell for that sum, assuming that it was not a forced sale. If forced, then the sale shows the views of but one party to the transaction, because the seller has no voice in it. In any event the important fact is an actual sale of the property in a fair way. If the sale were so far forced as to practically withdraw the views of the seller from any weight in the question of value, and conducted under oppressive circumstances and in an unfair way, then evidence of the price obtained at such an auction sale ought not to be admitted. In truth there might be objection to the evidence of a sale at auction upon the question of value on the ground that, although it showed an actual transaction between a buyer and seller, yet it is matter of common knowledge that sometimes such sales are improperly conducted and are forced and unfair, and, therefore, by reason of such possibilities the price paid at such sales ought not to be received as any evidence of the value of the property sold. This objection would suggest itself to anyone. The question whether the possibility that unfairness sometimes may be present ought to prevail as a conclusive objection to the evidence in any case, has been decided in the negative in this state. It was held that where it appeared that the sale was fairly conducted and bidders were present, and nothing occurred to show there was anything forced or unfair in the whole proceeding, evidence of the price obtained at such sale was competent.

In the case of *Campbell v. Woodworth* (20 N. Y. 499), in which Judge DENIO wrote the opinion of this court, the decision was in favor of the admissibility of such evidence under such facts. The judge thought there were many cases of sales at auction where the price obtained ought not to influence the jury in assessing the value of the property. Those were cases where the sales were not fair and really public, and where bidders were not present in numbers as they should have been. In other cases he thought that the result of an auction sale might be very high evidence of the value of the property sold. The question was not raised as to

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whether evidence of the purchase price of property at private sale was admissible, but simply whether the price obtained upon a sale at auction was admissible; whether the fact that the sale was at auction ought to render evidence of the price obtained incompetent. I think evidence of the price obtained at a private sale of chattels made in a *bona fide* manner, and not for the purpose of establishing a price, has been held competent in this state for many years. It has been admitted because it was evidence of an actual transaction between parties interested in the price of the article, the one to get the highest and the other to pay the lowest price for the property, and the fact that these diverse interests agreed upon a price was, in the nature of the question, some evidence of the value of the property sold.

In *Cary v. Greenman* (4 Hill, 625) COWEN, J., said that the price agreed upon by the parties at the time of the sale was high evidence of the then value of the horse, if sound. It was an action for breach of warranty, and it was not pretended that the price agreed upon was conclusive upon the question of value, but simply evidence upon that subject.

Judge WOODRUFF in *Beach v. Raritan, etc., Co.* (37 N. Y. 457-470), quotes this language of Judge COWEN, and himself adds that whether the price paid for a chattel or the price at which it is sold be admissible in evidence, depends upon the special circumstances in each case, as to the remoteness in time and place and other matters, but it is not claimed that the evidence of what price a chattel sold for must be confined to a sale at auction.

In *Hoffman v. Conner* (76 N. Y. 121), which was an action against the sheriff of New York county to recover damages for a false return, these facts appeared: Certain personal property had been taken by Conner, the sheriff, from the plaintiff, Hoffman, in an action in which Hoffman was defendant, and upon a writ for claim and delivery. Upon the trial of that action this plaintiff (defendant in that) recovered a judgment for the value of the property and damages for the detention thereof. Upon that judgment execution was issued to the

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defendant, commanding him to take the property from the plaintiff in that action, or in whose hands soever it might be, within his county, and deliver to this plaintiff. The execution thus delivered to Conner was held by him and he made a return that he could not find the property. In truth, it was in the hands of a third person in the same county, to the knowledge of the sheriff. The plaintiff, Hoffman, sued the sheriff for a false return, and upon the trial the plaintiff, for the purpose of proving the value of the property, was asked by her counsel what she paid for it. This was objected to as incompetent and the objection was overruled. This court held the ruling proper on the ground that what a party paid for property is some evidence of value. It was not pretended that the sale at which the plaintiff purchased was at auction.

Enough has been said as it seems to me to show that the price which an article brings upon a sale is some evidence of its value, and that such sale need not be at auction.

In this case it appears beyond all controversy that it was to the interest of these judgment creditors, the sellers of the property at Syracuse and Utica, to obtain as high a price as they could, and where the offer is to show that in fact the property was sold to the best advantage, we think the evidence as to the result of the sale should, under the circumstances of this case already detailed, have been admitted. It was not conclusive, perhaps a jury might think it was not very influential, but we say simply that it is competent and should have been taken. As there must be a new trial, on this ground we do not think it necessary to discuss the other questions which the defendant argued, for in regard to those in which there might be some doubt, they may not arise upon the new trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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JOSIE QUILTY, an Infant, by Guardian, Respondent, v. REBECCA
B. BATTIE and JOSEPH M. BATTIE, Appellants.

135	201
140	227

185 201
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A vicious domestic animal, if permitted to run at large, is a nuisance, and a person who, knowing its vicious character, keeps or harbors it is liable for all damages directly resulting from it.

Under the provisions of the Married Women's Act (Chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849, and chap. 172, Laws of 1862; Code Civ. Pro. § 450), a married woman has such freedom of control over her own real property that a husband cannot, without her consent and against her will, establish and maintain a nuisance upon it, and if she permits him so to do she is liable for the damages occasioned thereby.

A trespass committed by the wife in the care and management of her separate estate is her independent personal tort for which the husband is not liable, and in an action to recover damages therefor he is not a proper party.

It seems that under proper allegations and proof, he who owns and he who harbors a vicious animal may both be made responsible in the same action for a resulting injury.

In an action against a husband and wife to recover damages for injuries occasioned by the bite of a dog, it appeared that the husband was the owner of the dog, but kept it upon premises owned by the wife, upon which they both resided, she paying the expenses of the household; she knew of the vicious propensities of the dog, but permitted it upon the premises, feeding and caring for it. There was no evidence that the husband had other property upon the premises; that he was in possession as her tenant and had the care and management of his wife's property; that he assumed to direct as to the domestic animals to be kept on the place or that he knew of the vicious propensities of the dog, and he was sought to be held liable solely on the ground of his marital liability for the torts of his wife. *Held*, that the wife was properly held liable; but that a judgment against the husband was error.

Com. v. Wood (97 Mass. 225); *Com. v. Carroll* (124 id. 80); *Com. v. Pratt* (126 id. 462), distinguished.

Reported below, 61 Hun, 164.

(Argued June 8, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 8, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Matthew Hale for appellants. The court erred in holding that the defendant Rebecca B. Battie, being a married woman, living with her husband upon premises which she owned, was liable for an injury caused by the bite of a dog owned by her husband, and kept by him upon her premises. (*Koney v. Ward*, 36 How. Pr. 255; *Dickson v. McCoy*, 39 N. Y. 400; *Partenheimer v. Van Order*, 20 Barb. 479; *Kelly v. Tilton*, 2 Abb. Ct. App. Dec. 495; *Buckley v. Leonard*, 4 Den. 500; *Rider v. White*, 65 N. Y. 54; *Muller v. McKessin*, 73 id. 195; *Brice v. Bauer*, 108 id. 428; *Smith v. G. E. R. Co.*, L. R. [2 C. P.] 4.) The defendant Rebecca B. Battie was not made responsible for the acts of her husband's dog by the fact that she owned the premises on which she and her husband resided, and the dog was kept. (*Glover v. Alcott*, 11 Mich. 485; *Commonwealth v. Pratt*, 126 Mass. 462; *Commonwealth v. Carroll*, 124 id. 30; *Bertles v. Nunan*, 92 N. Y. 152; *Fitzgerald v. Quann*, 109 id. 441; *Jooss v. Fey*, 129 id. 17, 21; *Porter v. Dunn*, 43 N. Y. S. R. 193, 194; *In re Kaufman*, 43 id. 282; 2 S. & R. on Neg. [4th ed.] § 626; *Earl v. Van Alstine*, 8 Barb. 630; *Scribner v. Kelley*, 38 id. 14; *Meredith v. Reed*, 26 Ind. 334.) No cause of action under the complaint was proved against the defendant Joseph M. Battie. (*Fitzgerald v. Quann*, 109 N. Y. 441.)

L. H. Northup and *Job G. Sherman* for appellants. No cause of action was proved against the defendant Mrs. Battie. (*Stelz v. Shreck*, 128 N. Y. 263.) The defendant Joseph M. Battie was improperly joined as a defendant, and no cause of action for which he is liable was proved against him. (*Rowe v. Smith*, 45 N. Y. 230; *T. R. R. Co. v. Munger*, 5 Den. 255; 2 Hilliard on Torts, 82; *Barnum v. Mullen*, 47 N. Y. 577; *Fiske v. Bailey*, 51 id. 150.)

C. C. Van Kirk for respondent. The defendant Rebecca B. Battie is liable because she harbored the dog, knowing its vicious propensities, upon her premises. (*Keenan v. G. P. & R. M. Co.*, 27 Wkly. Dig. 433; *Loomis v. Terry*, 17 Wend. 497; *Fuller v. McKesson*, 73 N. Y. 195; *Brice v. Bauer*,

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108 id. 428.) One who allows a vicious dog to reside, unconfined, on her premises, knowing it to be vicious, is amenable for the injury it does. (*McKone v. Wood*, 5 C. & P. 1; *Lynch v. McNally*, 73 N. Y. 347; *Brice v. Bauer*, 108 id. 428; *Kelly v. Tilton*, 3 Keyes, 263; Whart. on Neg. 715, § 925; S. & R. on Neg. 227.) She is liable for allowing this vicious dog to reside on her premises, because thereby she is maintaining a nuisance upon her premises. (*Filler v. McKesson*, 73 N. Y. 199; *Wheeler v. Brant*, 23 Barb. 324, 326; *Winzler v. McCotter*, 22 Hun, 61; *Rowe v. Smith*, 45 N. Y. 233; Laws of 1860, chap. 90; *Case v. Case*, 49 Hun, 83.) A married woman, owning the premises on which she lives, though her husband lives with her, still is in full possession of the premises and is the legal occupant, still has the full control of her premises and may harbor a dog thereon, and still owns and controls her personal property. (*Potter v. McGrath*, 41 N. Y. Supp. 94.)

MAYNARD, J. The plaintiff has recovered against both defendants, who are husband and wife, for injuries resulting from the bite of a vicious dog.

The liability of the wife is disputed on the grounds that she is a married woman; that the dog belonged to her husband, and that she is not responsible for the trespasses committed by it. There is no conflict in the evidence upon any material point affecting her liability. She had been the owner of the premises where the dog was kept since December, 1887. They formerly belonged to her husband, and when she acquired title the dog remained there and was fed and cared for by her. It was shown to have had vicious propensities to her knowledge, and on one occasion she interfered to protect it when a person whom it had attacked attempted to strike it in self-defense. She bore the expenses of the household, and, with her husband, constituted the entire family. There is no proof in the record that he had any property there except the dog, or that he had the care or management of his wife's property, or was in possession of it as her tenant, or assumed

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to control or direct her with respect to the domestic animals which should be kept upon the place.

As stated in Addison on Torts (D. & B. ed. 230), it is not material in actions of this character whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog, and the harboring a dog about one's premises, or allowing it to be or resort there, is a sufficient keeping to support the action. As soon as such an animal is known to be mischievous it is the duty of the person whose premises it frequents to send it away or cause it to be destroyed.

The trial judge charged the jury, in substance, that if the dog was vicious and Mrs. Battie knew it, and, with such knowledge of its viciousness, kept and harbored it upon her premises, she was liable for the injury which plaintiff had sustained.

It is not denied that this instruction was unexceptionable unless the defendant was relieved from liability because of the fact that the dog was the property of her husband, and that he lived with her in the house and upon the premises where it was harbored and kept. A vicious domestic animal, if permitted to run at large, is a nuisance, and a person who knowingly keeps or harbors it, and thus affords it a place of refuge and protection, is liable for the maintenance of a nuisance, and for all the damages directly resulting from it.

The question, therefore, presented by this appeal, when plainly stated, is whether a married woman, under the laws of this state, has not such freedom of control over her own real property that her husband can, without her consent and against her will, establish and maintain a nuisance upon it?

The form in which it here arises most favorable to the appellants is upon their request for an instruction to the jury that the husband is the head of the family and controls what domestic animals shall be admitted to the household or kept about the house, to which the trial judge responded: "I so charge where the husband is the owner of the property, but where the wife is the owner of the property I decline to charge that."

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The Married Woman's Act of 1848 (Chap. 200, amended by chap. 375 of 1849) empowered Mrs. Battie to take and hold this real property to her sole and separate use, and to convey and dispose of it and its rents, issues and profits in the same manner and with like effect as if she was unmarried, and declared that it should not be subject to the disposal of her husband or liable for his debts. There does not seem to be much room for doubt as to the scope and object of this legislation. It effectually removes the common-law disability of the wife which deprived her of the possession and control of her property during coverture, and, to that extent, it extinguished the common-law rights and powers of the husband. Because it is in derogation of his common-law privileges it is to be rigidly applied and not extended by implication beyond its strict letter; but it is also a remedial act, and as to its clearly expressed subject-matter it should have a liberal construction. Full and absolute ownership of all property which the wife might have or acquire, with all its incidents, privileges and burdens, was evidently conferred upon her by this statute. In the acquisition and enjoyment of such property she shall be deemed to be an unmarried woman. Marital control of it was completely abrogated; not a trace of it was permitted to remain.

Her husband is thus placed upon the same footing as a stranger, and has no greater authority than a stranger to impose a burden upon her separate estate, or to restrict or embarrass her in the exercise of exclusive dominion over it. Afterwards came the act of 1860 (Ch. 90, amended by ch. 172 of 1862), which materially enlarged her rights and powers, and, among other things, provided that her property should, notwithstanding her marriage, be and remain her sole and separate property, and might be used, collected and invested by her in her own name, and should not be subject to the interference or control of her husband. Nor was she left powerless to enforce these newly acquired rights. Section 3 of the act of 1862, subsequently incorporated into section 450 of the Code, provided that in all matters relating to her separate

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property she might sue and be sued, as if she were sole. She has the same remedies to prevent or restrain her husband from unlawfully interfering with her property, as she has against any other person. If he keeps upon her premises a ferocious animal, she has the same authority of law to protect herself against this infringement of her property rights as against a like trespass by a neighbor. In *Minier v. Minier* (4 Lans. 421) the General Term of the third department held that the wife could maintain ejectment against her husband, and Judge PARKER, in his opinion, says that it is both logical and reasonable to construe the acts of 1860 and 1862 "as entitling her to bring just such a suit against her husband in relation to her property as she may bring against any other person." And as to her property, he further says: "The relation of husband does not affect it; as to it, the parties are strangers to each other."

In *Baum v. Mullen* (47 N. Y. 579) Chief Judge CHURCH, in commenting upon the effect of the act of 1862, says that with respect to her own property the wife "is to be treated as unmarried. All the rights of an unmarried woman are conferred upon her, and all correlative obligations are imposed. The statute has declared equality of rights, and equality of obligations and duties, and courts have no alternative but to enforce both. The wife is liable in the same manner, and to the same extent for frauds or torts committed in the management of her property, as she is upon contracts relating to it."

In *Rowe v. Smith* (45 N. Y. 230) the wife was held liable for damages resulting from the trespasses of her cattle, which had strayed from her premises to the lands of another, upon the ground that the same duty was imposed upon her, with respect to the care of her property, as upon others; and Judge ANDREWS, in his opinion, puts and answers the question which is directly involved in this case. At page 233 he says, "If the defendant should permit a nuisance upon her premises to the injury of her neighbor, would she not be liable in an action for the injury? The unlawful use permitted by her of her separate estate, in the case supposed, would make

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the action one relating to her separate estate, and in this case the violation of the duty incident to the ownership of the property has, we think, the same result, and brings the action within the intendment of the statute."

It must be borne in mind that we are not dealing with a case where a domestic animal is a trespasser upon the wife's property, or where the husband may have brought it and maintained it there without her consent. The jury found that she kept and harbored it upon her own premises, and the evidence is sufficient to support the finding. She could at any time have required him to remove it, and could have caused it to be destroyed, if compliance with the request had not been promptly granted.

There was no actual coercion here, and none can be implied. She not only assented to the maintenance of the dog upon her premises, but voluntarily assumed the burden of it.

The provisions of the statutes we have been considering, relate exclusively to the property rights of the parties to the marriage contract. Other marital rights are not affected by them. The husband is still the head of the family; the master of the house. He is entitled to the help and companionship of the wife, the control and discipline of his children and the regulation of the domestic affairs of the household. He may require the family to live with him in such suitable home as he may provide, but if, by the grace of his wife he maintains a home upon her property, he cannot use such property in any way not assented to by her. All such conjugal rights are unimpaired, but the right to keep a vicious animal upon his wife's premises, without her permission, is not one of them, unless there is some rule of the common law which we have not been able to discover, that regards a dog as a necessary part of the equipment of a well-ordered household.

We are referred to three cases in the Supreme Court, of Massachusetts (*Com. v. Wood*, 97 Mass. 225; *Com. v. Carroll*, 124 id. 30; *Com. v. Pratt*, 126 id. 462), but the decision of each was put upon grounds entirely consistent with the views we have here expressed. They hold that the husband may, in

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the exercise of his conjugal authority, prohibit the use of the house, which is the home of his family, for immoral or criminal purposes, even when it is upon the premises of his wife, for he may determine who shall visit the house, and it is his duty, for the good of the family, to prevent dissolute and criminal characters from resorting to it, and if he fails in the discharge of this duty and the house becomes disorderly, or it is employed for the purpose of violating the excise laws, he becomes criminally responsible as the keeper of a disorderly house or of a place where intoxicating liquors are sold, contrary to law. In *Com. v. Wood* the court says: "How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel."

It will be seen that the right to control her in the lawful use which she shall make of her property was not involved. It was a question of the extent of the conjugal authority of the husband over the members of his family, of which no legislation has yet attempted to deprive him.

The defendant, Joseph M. Battie, has also appealed from the judgment against him. He has been made liable, not on the ground that he was the owner of the dog, or that he co-operated with his wife in the commission of a wrong, but solely on the ground of his marital liability for the torts of his wife. The principles we have applied for the purpose of sustaining this judgment against her necessarily require his exemption from liability as her husband.

Under proper allegations and proofs, he who owns and he who harbors a vicious animal, may both be made responsible for a resulting injury in the same action. But there is no averment in the complaint that he was the owner of the dog, or knew of its vicious habits. At the commencement of the trial he moved for a dismissal of the complaint, as to him, which motion was improperly denied. This error might perhaps be disregarded or cured by amendment, if the jury had found that he had knowledge of the vicious propensities of the

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dog, but that question was not submitted to them, and without a finding to that effect we do not see how his liability has been established.

As the law was in 1889, when this cause of action arose, the husband was required to respond for what were called the personal torts of the wife, but a trespass committed by her in the care and management of her separate estate was not classed among such wrongs, and it has been repeatedly held that in such cases the husband was not a proper party defendant. (*Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 id. 577; *Fitzgerald v. Quann*, 109 id. 441; *Magnan v. Peck*, 111 id. 401.)

The judgment must be affirmed as to the defendant, Rebecca B. Battie, with costs, and reversed as to the defendant, Joseph M. Battie, and the complaint dismissed as to him, with costs in all courts.

All concur.

Judgment accordingly.

THE ROCHESTER LANTERN COMPANY, Respondent, v. THE
STILES AND PARKER PRESS COMPANY, Appellant.

Where, upon appeal in an action tried by the court or a referee, no case is made containing the evidence, but the appeal is based solely upon exceptions contained in the judgment-roll, and the findings of fact do not sustain the conclusions of law, it may not be assumed that there was evidence justifying other findings which would sustain the conclusions; on the contrary, it is to be assumed that there was no such evidence, and when the conclusions of law have been properly excepted to, the judgment may not be sustained.

The party succeeding should see to it that he has findings of fact sufficient to uphold his judgment, and if he does not he is exposed to the perils of a reversal by an appeal based solely upon exceptions to the legal conclusions.

Chubbuck v. Vernum (42 N. Y. 432); *Kellogg v. Thompson* (66 id. 88); *Murray v. Marshall* (94 id. 617); *Gardener v. Schwab* (110 id. 650), distinguished and limited.

While in an action for a breach of contract the plaintiff is entitled to recover all the damages occasioned by the defendant's breach, they must be such only as flow directly and naturally therefrom and must

135	209
130	325

135	209
143	288

135	209
147	580

135	209
155	453

135	209
161	444

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be certain both in their nature and in respect of the cause from which they proceed.

One K. entered into a contract with defendant by which the latter agreed to make and deliver to the former certain dies to be used in the manufacture of lanterns, in which business K. proposed to engage, but was not then engaged, and it did not appear that he contemplated doing so until the dies were furnished. Plaintiff was subsequently incorporated and K. assigned the contract to it; there had been at that time no breach thereof. In an action to recover damages for failure to deliver the dies, it appeared that plaintiff, for the sole purpose of carrying on said business, rented premises and employed men, and it was allowed, as items of damages, the expenses so incurred. *Held*, error; that the natural obvious consequences of the breach would be to compel K. or his assignee to procure the dies elsewhere and the increased cost, if any, would be the proper measure of damage; that even if K. could have recovered special damages, an assignee, of whose connection with the contract defendant had no notice, could not recover any such damages which were not contemplated when the contract was made.

(Argued June 3, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made November 20, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages for alleged breach of contract.

The facts, so far as material, are stated in the opinion.

Theodore Bacon for appellant. The contract between Kelly and the defendant was assignable. (Bishop on Cont. § 603; *Devlin v. City of New York*, 63 N. Y. 8.) The defendant never was under the slightest obligation to make the dies in question, in the manner specified, or any dies, in any manner, for the Rochester Lantern Company. (*N. Bank v. Hall*, 101 U. S. 43; *E. N. Bank v. Kauffmann*, 93 N. Y. 273; Chitty on Bills, 2, 15, 31; *Hadley v. Bazendale*, 9 Exch. 341.) The defendant, if there had been no assignment, would have been in no way liable to Kelly for the damages which the referee has allowed. (*Griffin v. Colver*, 16 N. Y. 489; *Booth v. S. D. R. M. Co.*, 60 id. 487; *Mayne on Dam-*

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ages, 8; *Fleming v. Beck*, 48 Penn. St. 309.) Still less was the defendant liable to the plaintiff, Kelly's assignee, for the expenses of its new establishment. (*Randall v. Raper*, EL. Bl. & EL. 84; *Reggio v. Braggiotti*, 7 Cush. 166.

William Nathaniel Cogswell, for respondent. The referee having found as a fact that the plaintiff has sustained certain damages, and the evidence not being incorporated in the case, the conclusion of law that the plaintiff is entitled to recover such damages necessarily follows. (*Dunn v. Hunt*, 32 N. Y. S. R. 735; *Gardner v. Schwab*, 110 N. Y. 650; *Berger v. Varrellmann*, 127 id. 281.) If the appellant is at liberty to question the amount of the damages found by the referee, the true rule of damages was observed. (*Griffin v. Colver*, 16 N. Y. 489; *Freeman v. Clute*, 3 Barb. 424; *Benton v. Fox*, 64 Ill. 417.)

EARL, Ch. J. The defendant brings this appeal without having made a case containing any of the evidence and relies solely upon exceptions contained in or annexed to the judgment-roll as provided in sections 994 and 997 of the Code. We do not know what the evidence upon the trial was, except as we are informed by the findings of facts.

The defendant does not complain of the findings of facts made by the referee, but it finds fault with his rulings upon matters of law, and the sole question before us is whether the rulings are justified by the facts found. In other words do the facts found justify the judgment? The learned counsel for the plaintiff, however, contends that if the findings of facts contained in the record are insufficient to uphold the judgment then we may assume that there was evidence upon the trial sufficient to justify other findings of facts which would support the conclusions of law. Such undoubtedly is the rule when upon an appeal a case has been made containing the evidence. Then the appellate court may look beyond the findings of facts into the evidence, and see if there is any evidence to support the conclusions of law, and it may affirm the judg-

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ment even if the findings of facts actually made do not support it if it finds sufficient evidence to justify it. But there is no foundation for this rule when the appeal is upon the judgment-roll alone, and the evidence is not before the court. Then the appellate court can know nothing about the evidence except as it is embodied in the findings of facts, it cannot know that there was any other evidence, and there is no room or ground for presuming that there was any. In the former case there is no presumption that there was any other evidence than that contained in the record. But finding the evidence there the court may presume, for the purpose of upholding the judgment, that the judge or referee found the facts which the evidence justified. But in the latter case, the rule contended for on behalf of the plaintiff would require the court to presume, not only the evidence, but the findings of facts based upon it. For this there is no reason. The party succeeding upon a trial before a judge or referee must see to it that he has findings of facts sufficient to uphold his judgment, and if he does not he is exposed to the peril of a reversal of his judgment by an appeal based solely upon the exceptions of the defeated party to the conclusions of law. If the rule contended for by the plaintiff be sustained, then very rarely, if ever, would it be safe for a defeated party to appeal without a case as it would nearly always be possible to presume facts were proved although not actually found, which would support the judgment.

The law upon this matter of practice by some inadvertence has fallen into some confusion and conflict, and it is time that the practice should be finally settled.

In *Chubbuck v. Vernum* (42 N. Y. 432), the statement in the head-note that "where the case contains none of the evidence and only the findings of fact and conclusion of law of the referee, an exception to the conclusion of law, as not authorized by the facts found, is not good," went beyond the actual decision. In that case there was a general finding of the facts against the plaintiff, and with that finding in the record, it could not be said that the conclusion of law was

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without support, and besides, the judgment was affirmed without any resort to presumptions upon the facts actually found. There were, however, some unguarded expressions in the opinion of the chief judge, which were disapproved in *Stoddard v. Whiting* (46 N. Y. 627), where Judge GROVER said: "The counsel for the respondent insists that, as the case does not contain any of the evidence given upon the trial before the referee, but only the facts found by him and his legal conclusions thereon, and the exceptions taken by the appellant to such legal conclusions, no question is presented which can be reviewed by this court, and cites, in support of this position, *Chubbuck v. Venum* (42 N. Y. 423). In the syllabus of the reporter, it is stated that when the case contains none of the evidence and only the findings of fact and conclusions of law of the referee, an exception to the conclusions of law as not authorized by the facts found, is not good. One of the opinions delivered sustains this idea. The learned judge says: "The party seeking to uphold the report of the referee is entitled to the benefit, not only of the facts actually found by the referee, but also, if necessary to sustain the conclusions of law by the referee, to all such facts as the evidence tended to prove, and as the referee might have found in his favor. Hence, without examining the case further, there would be abundant reason for affirming the judgment." This entirely overlooks the obvious fact that, in the absence of all the evidence, it can never appear that there was any evidence tending to prove any additional facts, and, therefore, authorizing an assumption of the finding of any such facts. The judge did not base his opinion upon this ground alone, but proceeded to show that, from the facts, the conclusions of law were correct. In the other opinion published, no allusion is made to any such reason for the affirmance of the judgment. This shows that no such question was determined in the case. The true rule, where the case does not contain any of the evidence, but the findings of facts only, is to assume that there was no evidence from which any other facts could be found, and where the conclusions of law in such a case have been excepted to, the

question to be determined is, whether such conclusions are warranted by the facts found;” and the judgment was reversed. In *Kellogg v. Thompson* (66 N. Y. 88), Chief Judge CHURCH said: “The evidence given on the trial is not contained in the case. We must assume, therefore, that the facts proved were sufficient to sustain the findings, and also any additional findings necessary to sustain the conclusions of law not in conflict with the affirmative facts found.” He made no reference to the case of *Stoddard v. Whiting*, nor does it appear that his attention was called to it by counsel. The remark was purely *obiter*, as the judgment was affirmed, without indulging in any presumptions, upon the facts actually found. In *Murray v. Marshall* (94 N. Y. 617), Judge FINCH adopted the *obiter dictum* contained in *Kellogg v. Thompson*, without referring to the case of *Stoddard v. Whiting*, and apparently without having his attention called to it; but his conclusion was finally reached by taking the facts as they had been actually found at the trial term. In *Gardiner v. Schwab* (110 N. Y. 650), Judge GRAY said: “As the case presented here does not contain the evidence given upon the trial, the correctness of the conclusions of law made by the referee is alone the subject for review. If they are sustained by the findings, the judgment must be sustained. We are only concerned with the legal effect of the facts as found. These findings of fact we must assume to be true, and we must also assume that the facts proved on the trial were sufficient to sustain these findings. Indeed, if necessary, we must assume that they were sufficient to sustain any additional findings required to support the conclusions of law not in conflict with the affirmative facts found.” And he cited *Kellogg v. Thompson* and *Murray v. Marshall*, but did not refer to *Stoddard v. Whiting*. But he did not assume any facts not found, as he concluded his opinion as follows: “We think his findings of fact justified his conclusions of law, and for that reason the judgment of the General Term should be affirmed.”

This brief review of the cases in this court shows that the inconsiderate *dictum* in *Kellogg v. Thompson* has borne a small

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progeny of *dicta* — all in conflict with what was actually and deliberately decided in *Stoddard v. Whiting*, and we must now reaffirm the doctrine of that case. Therefore, in disposing of this case, we must take the facts as found by the referee, and they are as follows: On the 19th day of March, 1887, James H. Kelly entered into a contract with the defendant whereby it was to make and deliver to him certain dies to be used by him in the manufacture of lanterns; that it agreed to make and deliver the dies within a reasonable time, that is, within five weeks from the time of the order, to manufacture and deliver the same; that the plaintiff was incorporated shortly prior to the 27th day of August, 1887, and on the twenty-ninth day of that month Kelly duly assigned to the plaintiff his contract with the defendant, and all his rights and claims thereunder; that the plaintiff failed to establish by evidence that at or prior to the time of making the contract, the defendant was informed that any corporation was intended to be organized, or that the contract was made for the use or benefit of any other person or corporation than Kelly; that the first notification received by the defendant that the plaintiff had any interest in the contract, or that such a corporation as the plaintiff existed, so far as was proven upon the trial, was given to it by a letter dated March 22, 1888, and signed "Rochester Lantern Company, by James H. Kelly, President;" that from time to time after making the contract samples were sent by Kelly to the defendant and dies were shipped to him by the defendant; that the last sample for the last die to be made was sent by Kelly to the defendant on the 29th day of July, 1887; that by the conduct of Kelly and the defendant performance of the contract within the time originally stipulated was waived, and the contract except as to time of performance was regarded as still in force at the date of the assignment thereof; that a reasonable time in which the defendant could have carried out and performed the contract after August 29, 1887, was five weeks, which expired October third; that Kelly was a manufacturer of lanterns in Rochester and required the dies for the

manufacture of lanterns which he designed to put upon the market as the defendant was informed and well knew, and that the plaintiff after its incorporation succeeded him in the business of manufacturing lanterns; that the defendant failed to carry out the contract and to furnish dies as thereby required; that the plaintiff for the sole purpose of carrying on the business of manufacturing the lanterns which it was intended that these dies should make, entered into certain obligations and incurred certain liabilities as follows: It paid one Butts for rent of room from October 3 to November 1, 1887, the sum of \$31.86; it paid one Broad, an employe, for his wages from October 3, 1887, to March 24, 1888, the sum of \$250, and one Briston, an employe, for his wages during the same time the same sum; it paid to Crouch & Sons for the rent of premises from November 1, 1887, to March 24, 1888, \$278.46; that by reason of defendant's failure to perform the contract as agreed by it the plaintiff was unable to manufacture any lanterns for the market until after the commencement of this action on the 24th day of March, 1888, and that the plaintiff by reason of such failure sustained loss in the sums above mentioned which it actually paid, and the referee awarded judgment for the amount of the items above specified.

We do not think these facts sufficient to justify the recovery of the items of damages specified. There had been no breach of the contract at the time of the assignment thereof to the plaintiff, and at that time Kelly had no claim against the defendant for damages. After the assignment Kelly had no interest in the contract and the defendant owed him no duty and could come under no obligation to him for damages on account of a breach of the contract by it. There is no doubt that Kelly could assign this contract as he could have assigned any other chose in action, and by the assignment the assignee became entitled to all the benefits of the contract. (*Devlin v. Mayor, etc.*, 63 N. Y. 8.) The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered,

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and that obligation could be discharged by any one. He could not, however, by the assignment, absolve himself from all obligations under the contract. The obligations of the contract still rested upon him and resort could still be made to him for the payment of the dies in case the assignee did not pay for them when tendered to it. After the assignment of the contract to the plaintiff the defendant's obligation to perform still remained, and that obligation was due to the plaintiff, and for a breach of the obligation it became entitled to some damages, and so we are brought to the measure of damages in such a case as this.

It is frequently difficult in the administration of the law to apply the proper rule of damages, and the decisions upon the subject are not harmonious. The cardinal rule undoubtedly is that the one party shall recover all the damage which has been occasioned by the breach of the contract by the other party. But this rule is modified in its application by two others: The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect of the cause from which they proceeded. Under this latter rule speculative, contingent and remote damages which cannot be directly traced to the breach complained of are excluded. Under the former rule such damages only are allowed as the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. (*Hadley v. Baxendale*, 9 Excheq. 341; *Griffin v. Colver*, 16 N. Y. 489; *Leonard v. N. Y., etc., Tel. Co.*, 41 id. 544, 566; *Cassidy v. Le Fevre*, 45 id. 562.)

The natural and obvious consequence of a breach of this contract on the part of the defendant would be to compel Kelly or his assignee to procure the dies from some other manufacturer, and the increased cost of the dies, if any, would be the natural and ordinary measure of the damages; and such would be the damages which it could be fairly supposed the parties expected, when they made the contract, would flow from a breach thereof. It does not appear that Kelly was

engaged in the manufacture of lanterns when the contract was made, or that he contemplated engaging in the business until dies were furnished. No fact is found showing that the defendant had any reason to suppose that he would hire any workmen or persons before the dies were furnished, and it cannot be said that it was a natural and proximate consequence of a breach of the contract that he would have idle men or unused real estate causing him the expenses now claimed. Much less can it be supposed that the defendant could, when the contract was made, anticipate that the contract would be assigned and that the assignee would employ men and premises to remain idle after the defendant had failed to perform the contract and in consequence of such failure. Such damages to the assignee could not have been contemplated as the natural and proximate consequence of a breach of the contract. If we should adopt the rule of damages contended for by the plaintiff, what would be the limits of its application? Suppose instead of employing two men the plaintiff had projected an extensive business in which the dies were to be used, and had employed one hundred men, and had hired or even constructed a large and [costly building in which to carry on the business, and had kept the men and the building unemployed for months and, perhaps, years, could the whole expense of the men and building be visited on the defendant as a consequence of its breach of contract? If it could we should have a rule of damages which might cause ruin to parties unable from unforeseen events to perform their contracts.

The damages allowed by the referee in this case are special damages, not flowing naturally from the breach of the contract, and, we think, the only damages such an assignee in a case like this can recover is the difference between the contract-price of these dies and the value or cost of the dies if furnished according to the contract. Even if Kelly could have recovered special damages, we see no ground for holding that his assignee, of whose connection with the contract the defendant had no notice, could recover special damages not contemplated when the contract was made.

Statement of case.

We are, therefore, of opinion that the award of damages made by this judgment was not justified by the facts found, and that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

BENEDIOTA DURNHERR, Appellant, v. JOSEPH RAU,
Respondent.

185	219
d158	122
j158	124
158	486
185	219
f162	110
185	219
j170	1559

It is not sufficient that the performance of a covenant by a grantee in a deed may benefit a third person, to entitle the latter to enforce it, but the covenant must have been entered into for his benefit, or such benefit must be the direct result of performance and so, within the contemplation of the parties, and the grantor must also have a legal interest that the covenant be performed in favor of the party claiming performance. D., plaintiff's husband, executed to defendant a deed of certain premises, with covenant of warranty; he had previously executed mortgages thereon in which plaintiff joined. The grantee covenanted to pay all incumbrances, "by mortgage or otherwise," and the deed declared that the grantor's wife reserved her right of dower in the premises. The mortgages were subsequently foreclosed and the premises sold. In an action for breach of the covenant, plaintiff claimed as damages the value of her inchoate right of dower cut off by the foreclosure. *Held*, untenable; that the only legal operation of the clause concerning dower was to limit the warranty by excluding therefrom plaintiff's dower right; that plaintiff's joinder in the mortgages was a voluntary surrender of her dower right and bound her interest, to the extent necessary to protect the securities; that the essential relation of debtor and creditor between the grantor and plaintiff, or such a relation as makes the performance of the covenant at the instance of plaintiff a satisfaction of some legal or equitable duty owing by the grantor to her was also lacking, as he owed her no duty, enforceable in law or equity, to pay the mortgages to relieve her dower.

Lawrence v. Fox (20 N. Y. 268), distinguished.

Reported below, 60 Hun, 858.

(Argued June 8, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made June 2, 1891, which affirmed an order entered upon the minutes, setting aside a verdict in favor of plaintiff and granting a new trial.

Statement of case.

This was an action to recover damages for an alleged breach of covenant in a deed from Emanuel Durnherr, plaintiff's husband, to defendant.

The facts, so far as material, are stated in the opinion.

Theodore Bacon for appellant. The court was in error in judging that a legal debt or duty from the promisee to the third person, for whose avowed benefit the promise is made, is necessary to enable such third person to sue upon the promise. (*Thorp v. K. C. Co.*, 48 N. Y. 253; *Grant v. D. S. Co.*, 77 Wis. 72.) The obligation of the husband to provide for the wife, whether in his lifetime or after death, is such an "obligation or duty" as will sustain the promise to the husband for the benefit of the wife, made for that declared purpose. (*Partridge v. Havens*, 10 Paige, 618; *Garlick v. Strong*, 3 id. 440; *T. N. Bank v. Guenther*, 123 N. Y. 568; *Romaine v. Chauncey*, 129 id. 566; *Denton v. Nanny*, 8 Barb. 618; 4 Kent's Comm. 50; *Mills v. Van Voorhes*, 20 N. Y. 412; *Kursheedt v. Savings Inst.*, 118 id. 359; *Vartie v. Underwood*, 18 Barb. 561; *Simar v. Canaday*, 53 N. Y. 298; *Youngs v. Carter*, 10 Hun, 194; *Dutton v. Poole*, 2 Lew. 210; *Todd v. Weber*, 95 N. Y. 181; *Munroe v. Crouse*, 59 Hun, 248.) The relation of debtor and creditor is disclosed in the present case by a closer analogy even than that referred to in the case of *Youngs v. Carter*. (*Gore v. Townsend*, 8 L. R. A. 442; Kelly's Contracts of Married Women, 105; 1 Bish. Marr. Women, § 604.) "The plain and manifest intention of the parties, as collected from the four corners of the instrument," shall, if possible, be carried out. (Broome's Leg. Max. 417.)

William E. Edmonds for respondent. The agreement contained in deed dated April 16, 1875, was in its effect a full and complete revocation, rescission and release to defendant of any and all obligations contained in the deed March 29, 1875. (*Scofield v. McGregor*, 63 N. Y. 638; *Hadden v. Dimick*, 48 id. 661; *Price v. Gowen*, 10 id. 465; Fry on Spec. Perf.

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§ 683; *Kelly v. Roberts*, 40 N. Y. 432; *Healy v. Utley*, 1 Cow. 345.) The agreement contained in the deed from Emanuel Durnherr to Joseph Rau, dated March 28, 1875, did not contain any provision by which a right of action for dower can be maintained by plaintiff against defendant. (*Vrooman v. Turner*, 69 N. Y. 284; *Seward v. Huntington*, 94 id. 111; *Kings v. Watts*, 14 Wend. 38; *Fonda v. Sage*, 46 Barb. 109; Code Civ. Pro. §§ 1597, 1598, 1599, 1600, 1601, 1602.)

ANDREWS, J. The deed from Emanuel Durnherr to the defendant recited that it was given in payment of a debt owing by the grantor to the grantee of \$660, "and the further considerations expressed herein." The grantee covenanted in the deed to pay all incumbrances on the premises "by mortgage or otherwise." This constitutes the only "further consideration" on his part expressed therein. The deed also declared that the wife of the grantor (the plaintiff) reserved her right of dower in the premises. The conveyance contained a covenant of general warranty by the grantor, and the only legal operation of the clause respecting the dower of the wife was to limit the scope of the warranty by excluding therefrom her dower right. By the foreclosure of the mortgages on the premises existing at the time of the conveyance, in which (as is assumed) the wife joined, the title has passed to purchasers on the foreclosure, and the inchoate right of dower in the wife has been extinguished. This action is brought by the wife on the defendant's covenant in the deed, and she seeks to recover as damages the value of her inchoate right of dower, which was cut off by the foreclosure.

The courts below denied relief, and we concur in their conclusion. The covenant was with the husband alone. He had an interest in obtaining indemnity against his personal liability for the mortgage debts, and this, presumably, was his primary purpose in exacting from the grantee a covenant to pay the mortgages. The cases also attribute to the parties to such a covenant the further purpose of benefiting the holder of the securities, and the natural scope of the covenant is extended

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so as to give them a right of action at law on the covenant, in case of breach, as though expressly named as covenantees. (*Burr v. Beers*, 24 N. Y. 178.) But the wife was not a party to the mortgages, and in no way bound to pay them. She had an interest that they should be paid without resort to the land, so that her inchoate right of dower might be freed therefrom. The husband, however, owed her no duty enforceable in law or equity to pay the mortgages to relieve her dower. The most that can be claimed is that the mortgages having (as is assumed) been executed to secure his debts, and he having procured the wife to join in them and pledge her right for their payment, he owed her a moral duty to pay the mortgages, and thereby restore her to her original situation. But according to our decisions no legal or equitable obligation, of which the law can take cognizance, was created in favor of the wife against the husband or his property by these circumstances. She was not in the position of a surety for her husband. Her joinder in the mortgages was a voluntary surrender of her right for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. (*Manhattan Co. v. Evertson*, 6 Pai. 467; *Hawley v. Bradford*, 9 id. 200.) There is lacking in this case the essential relation of debtor and creditor between the grantor and a third person seeking to enforce such a covenant, or such a relation as makes the performance of the covenant at the instance of such third person a satisfaction of some legal or equitable duty owing by the grantor to such person, which must exist according to the cases in order to entitle a stranger to the covenant to enforce it. It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance. (*Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 id. 280; *Lorillard v. Clyde*, 122 id. 498.) The application of the doctrine of *Lawrence v. Fox* (20 N.

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Y. 268), to this case would extend it much further than hitherto, and this cannot be permitted in view of the repeated declarations of the court that it should be confined to its original limits.

The order should be affirmed, and judgment absolute ordered for the defendant with costs.

All concur.

Order affirmed and judgment accordingly.

HENRY FERA, Respondent v. DANIEL H. WICKHAM et al.,
Appellants.

185	228
d155	405
185	228
159	449

Where no right of set-off exists when an assignment by an insolvent debtor for the benefit of creditors is made, it cannot arise afterwards in favor of one indebted to the insolvent estate who is also a creditor.

Where therefore, among the assets transferred by such an assignment, was a demand against one who at the time the assignment was made held a demand against the assignor which had not then matured, *held*, that he was not entitled to a set-off; and this, although his claim against the estate matured before that against him.

Rothschild v. Mack (42 Hun, 72), overruled.

Rothschild v. Mack (115 N. Y. 1); *Richards v. La Tourette* (119 id. 54); *Lindsay v. Jackson* (3 Paige, 581); *Chance v. Isaacs* (5 id. 592); distinguished and explained.

Fera v. Wickham (61 Hun, 343), reversed.

(Submitted June 3, 1892; decided October 4, 1892.)

*APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 19, 1891, which affirmed an interlocutory judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, overruling a demurrer to the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hess, Townsend & McClelland for appellants. A claim of a creditor of the assignors under a general assignment will

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not be allowed as a set-off against a claim of the assignors against him, the former maturing first, but neither maturing until after the execution and delivery of the general assignment. (*Myer v. Davis*, 22 N. Y. 493; *Martin v. Kunzmuller*, 37 id. 396; *Schieffelin v. Hawkins*, 14 Abb. Pr. 115.)

Goldsmith & Doherty for respondent. It must be conceded that if D. H. Wickham & Co. had not assigned, but held the notes until their acceptance had become due, the plaintiff could have maintained this action, for he would be at liberty to waive the unexpired credit and elect to make his debt to Wickham due *in presenti*. (*Lindsay v. Jackson*, 2 Paige, 581.) The power of courts of equity to decree set-off of mutual demands in cases of the insolvency of one of the parties, exists irrespective of the statute, and it will always be exercised where justice requires it. (*Holbrook v. A. F. Ins. Co.*, 6 Paige, 220; *Richards v. La Tourrette*, 119 N. Y. 54; *Smith v. Felton*, 43 id. 419; *Davidson v. Alfaro*, 80 id. 660.) It is immaterial that the demands become due after the acts of insolvency. (*F. T., etc., Co. v. M. Bank*, L. R. [9 App. Cas.] 108; *Stewart v. Anderson*, 6 Cranch. 203; *Merrill v. Souther*, 6 Dana, 305; *Coates v. O'Donnell*, 16 J. & S. 46; 94 N. Y. 168; *Waterman on Set-off*, § 132; *Chance v. Isaacs*, 5 Paige, 592; *Rothschild v. Mack*, 42 Hun, 72; *Chenault v. Bush*, 84 Ky. 528; *Brooks v. Cannon*, 9 N. Y. S. R. 506.) The assignee for the benefit of creditors does not stand in any better position than his assignor. (*Smith v. Felton*, 43 N. Y. 419; *Littlefield v. A. Bank*, 97 id. 581; *A. S. Bank v. Tartter*, 54 How. Pr. 385; *Jones v. Robinson*, 26 Barb. 310.) The case is one of mutual credits, and in all such cases equity decrees a set-off of one demand against the other where one of the parties becomes insolvent, if the debt due from the insolvent matures before the debt due to the insolvent. (*Rose v. Hart*, 2 Smith's L. C. [9th ed.] 1588; *Jones v. Robinson*, 26 Barb. 210; *Brooks v. Cannon*, 9 N. Y. S. R. 506; *Martin v. Kunzmuller*, 37 N. Y. 396; *Bradley v. Angel*, 3 id. 477.)

Opinion of the Court, per GRAY, J.

Defendants' liability on the original indebtedness always continued. (*Graham v. Negus*, 8 N. Y. Supp. 679.)

GRAY, J. The firm of Wickham & Co., having become insolvent, made a general assignment for the benefit of their creditors. On October 27, 1890, at the time of this assignment, the plaintiff held their unmatured acceptance of a draft to the amount of \$1,390.60 for goods sold. The assignee became by the assignment the holder of a promissory note made by the plaintiff to Wickham & Co.'s order for \$536.25. The accepted draft was payable November 6, 1890, and the plaintiff's note was payable on June 9, 1891.

The plaintiff has brought the present action to secure an equitable offset of the debt to him from the insolvent estate, as against the debt due by him. Upon the defendant's demurrer to his complaint, the courts below have held the relief within the power of a court of equity to award, and, therefore, gave plaintiff judgment. In the opinions, delivered at the Special and General Terms of the Supreme Court, the learned justices relied upon the decision in *Rothschild v. Mack* (42 Hun, 72). The opinion of the General Term of the fifth department in that case was affirmed by this court, as to the correctness of the conclusion arrived at. (115 N. Y. 1.) But the appeal was not decided in this court on the ground taken by the General Term in their opinion, but, solely, because a cause of action on contract did exist in the complainant's favor against the insolvent assignor at the time of the assignment. The learned justices below, in the present case, have felt themselves constrained, apparently, to follow the decision in the fifth department; inasmuch as in this court, in the *Rothschild* case, the correctness of the General Term views was not expressly denied.

It must be conceded that the opinion of this court in the *Rothschild* case seemed to leave open for further discussion the question passed upon by the General Term; namely, of the right to an equitable offset where, at the time of the assign-

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ment, the party was only contingently liable. It was the opinion there that the general rule in equity should obtain, if the liability of the insolvent estate had become actual prior to the time of the maturity of the demand due to the estate. This view, however, I think to be untenable, if we are to be guided by the authority of previous decisions in this court. In the *Rothschild* case, neither plaintiffs' claim on the note, nor the assignee's claim against them, were due at the time of the assignment, but, because of the fraud practiced upon the plaintiffs, in the manner in which the moneys were obtained from them, it was held that a cause of action in assumpsit arose at once in their favor for the recovery back of the moneys. It existed the moment the insolvent assignors obtained the money, and being a proper subject of set-off, in any action which might have been brought by the parties against whom it existed, it could properly be offset against the debt due from the plaintiffs to the assignee, *pro tanto*.

The subsequent case of *Richards v. La Tourette* (119 N. Y. 54) was that of an action by the assignee of an insolvent firm to foreclose a mortgage. The defendant demanded that the assignee set off, in reduction of his indebtedness upon the mortgage, the indebtedness due from the assignors to him. The particular and only question presented was whether, as the defendant's debt upon the mortgage was not due at the time of the assignment, the debt owing to him from the assignors, and which was due at that time, could be equitably applied in reduction of the mortgage debt. The right to the offset was upheld because of the immateriality of the fact that the debt owing to the insolvents was not due when the assignment was made. The debtor to the insolvents could elect to treat his debt as presently due, and waive any defense on any such ground.

Where this case differs from the *Rothschild* case is that there was no cause of action in favor of the plaintiff at the time of the assignment. The question here is whether the plaintiff has an equitable right to an offset of his demand against the insolvent estate, which had not matured at the

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time of the assignment, but which did subsequently mature before the demand held by the assignee against him matured. In the solution of this question, we might find some embarrassment in endeavoring to reconcile expressions of opinion by the judges in earlier cases, and, after a very careful consideration, I am disposed to hold that by an assignment in trust for the assignor's creditors, what natural equities previously existed become suspended by an intervention of the rights of other creditors. The natural equity in offsetting cross-demands, which had its rise in the rule of the civil law, was soon adopted by the Court of Chancery in cases where, from the situation of the parties, cross-actions at law were inadequate. Hence, if one of the parties should become insolvent, the insolvency was recognized as presenting a case for equitable interference. But the rule was limited in its application to cases where the equitable rights of others were not interfered with.

Thus, in *Lindsay v. Jackson* (2 Paige, 581), the bill was filed to restrain the defendants from negotiating complainant's notes to others and for a set-off of cross-demands, and the insolvency of the defendants was considered a sufficient reason for permitting an offset of their debt to complainant as against the complainant's debt to them.

But in *Chance v. Isaacs* (5 Paige, 592), which was a similar action to that of *Lindsay v. Jackson*, the relief of set-off was denied by the vice-chancellor, because an assignment had been made, under which the creditors of the insolvent party acquired an interest in the complainant's notes before his demand against the defendants had matured. His decree was affirmed. It is true that the chancellor in that case thought that the right of set-off would have existed, although the defendants' note, upon which complainant was liable as indorser, was not due at the time of the assignment, if the complainant had held it. He regarded the fact that complainant did not hold the note at that time as precluding him from demanding a set-off. The remark referred to in the opinion in *Chance v. Isaacs* does not seem to me to have been regarded as controlling in

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later cases. It was unnecessary to the decision there and I think we must refuse to be guided by it.

In *Bradley v. Angel* (3 N. Y. 475), the complainants owed defendant's testator for goods purchased. They held his notes falling due at times subsequent to his decease. A suit was commenced against them for their indebtedness to the estate and they commenced this action to secure an offset of the testator's unmatured notes as against their present indebtedness and to restrain the action at law. Judge GARDNER, in holding that a set-off could not be permitted, on the ground that the testator's contract could not be changed by compelling payment before maturity, assigned as a reason that it would be to the prejudice of other creditors. Thus, the plaintiffs were obliged to pay their indebtedness to the estate, though holding the testator's notes which they were not permitted to have set off.

In *Myers v. Davis* (22 N. Y. 489), the action was by an assignee to recover on a claim against the defendants for goods sold to them by his assignors. At the time of that transaction the defendants were manufacturing certain wares upon the assignors' order, and at the time of the assignment the order was yet unfilled. When finished the price exceeded the amount which they owed to the insolvent estate. The demand against them, because of the terms of credit on which the goods had been sold to them, did not become due until some time after they had filled the order of the assignors and had become entitled to be paid. The defendants asked to have allowed, upon what the assignee claimed from them, the amount of the claim which they held against the estate in his hands. A set-off was refused and Judge DENIO, after remarking that there was no relation between the claims of the respective parties other than that which always exists between persons having reciprocal demands against each other, stated the rule thus: "That when such claims exist in a perfect condition at the same time, either party may insist upon a set-off. So, where the one claiming a set-off has a demand against the other presently payable, and the other party is insolvent, the

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former may claim to have the set-off made, though the demand of his adversary against him has not become payable. But if, before the demand of the party claiming the set-off becomes mature, the opposite claim has been assigned, whether the assignment carries the legal or only an equitable title, the right of set-off no longer exists."

In *Martin v. Kunzmüller* (37 N. Y. 396) the action was by an assignee to recover for goods sold by the assignors, and the defendants were not permitted to offset the amount of a note of the assignors held by them and which matured after the assignment. DAVIES, Ch. J., in his opinion in the case, held, on the authority of *Myers v. Davis*, that "the debt not matured could not be subject to a set-off against the plaintiff." Judge DAVIES, in support of his opinion, refers to *Chance v. Isaacs* (*supra*), but only to the vice-chancellor's decision; regarding the decision of the chancellor on appeal as the mere affirmance of the decree. The point, as I take it, in the vice-chancellor's opinion, and as Judge DAVIES also seemed to consider, was that the creditors under the assignment had acquired an interest in the complainant's notes before he had become liable on the assignor's note. The principle upon which the decisions were based was, as stated in Judge PARKER's opinion in *Martin v. Kunzmüller*, that the assignee takes the contract assigned to him, subject to the right of set-off, which the debtor had against it at the time of the assignment.

In other words, if there is no right of set-off when an insolvent assignment is made, it cannot arise afterwards in favor of a creditor. Cross-demands, which do not mature until after such an assignment, could not have been the subject of set-off when the assignment was made; for a demand *in presenti* is necessary to an allowance by way of set-off.

I think the logical and natural extension of the principle of the decision in *Myers v. Davis* is authoritative in the decision of the present case. The right of set-off must attach at the time of the making of the assignment. It cannot arise afterwards, for the reason that the claim in favor of the estate has passed to the assignee, and to allow a set-off would be to the

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prejudice of other creditors. I think the principle to which we should adhere is this: When a party asks to have set-off against a demand upon him held by an assignee for the benefit of creditors, a claim against the insolvent estate, it will be allowed, provided his was a claim upon the estate due when the assignment was made; upon the ground that, by reason of the existence of cross-demands at the time of the assignment, which were due (or might have become due at the creditor's election), an equitable adjustment by set-off is made without interfering with the equities of others. But after the estate has passed to an assignee upon a trust to hold for and to distribute among creditors, the former and natural equity disappears in superior equities vesting in the general body of creditors. They are then interested in having equality of distribution, and if a creditor who, when the assignment was made, had no right to any offset, may be allowed it afterwards, he gains a preference. By the intervention of the rights of third persons, under the assignment, the equities change with the change in the situation of the original parties; to the misfortune of the creditor holding the demand against the insolvent estate, but, nevertheless, in accordance with equitable principles, as I deduce them from the decisions.

The order and judgment below should be reversed and judgment should be ordered for the defendants upon the demurrer, dismissing the complaint of the plaintiff, with costs in all the courts.

All concur.

Judgment accordingly.

Statement of case.

185	281
d154	124
154	182
185	281
157	67

THE PEOPLE ex rel. THE SAVINGS BANK OF NEW LONDON,
Appellants, v. MICHAEL COLEMAN et al., Commissioners of
Taxes of the City of New York, Respondents.

As a general rule all property within this state is liable to taxation, and to sustain a claim of exemption the claimant must point out some statute clearly giving it.

The provision of the Revised Statutes (1 R. S. 388, § 4, subd. 71) exempting "the personal estate of every incorporated company not made liable to taxation on its capital" includes only corporations having a capital, which is not liable to taxation as such; it does not embrace corporations having no capital.

A corporation organized under the laws of another state having property in this state can claim no exemption from taxation on account of the laws of its own state.

While it seems the legislature may constitutionally impose double taxation, its purpose so to do may never be inferred, but must plainly appear.

As to whether depositors in savings banks are taxable upon their deposits, *quære*. (EARL, Ch. J., and FINCH, J., holding that they are.)

As to whether the act of 1882 (Chap. 402, Laws of 1882), repealing the provision of the act of 1875 (§ 56, chap. 371, Laws of 1875), which repealed the provision of the acts of 1866 (§ 7, chap. 761, Laws of 1866), providing for the taxation of banks on their "privileges and franchises," and also repealed the act of 1867 (Chap. 861, Laws of 1867), amending the same, restored said provision, *quære*.

Said provision, if in force, has no application to foreign savings banks.

The only exemption such a bank can claim is under the act of 1857 (Chap. 456, Laws of 1857), which exempts deposits due depositors but not its surplus.

A foreign savings bank is, therefore, liable to taxation upon its surplus invested in this state.

Accordingly *held*, where a savings bank of another state had invested a portion of its surplus in the purchase of stock of a bank in this state, that it was liable to assessment and taxation upon the value of the shares of said bank at the place where the bank is located (§ 312, chap. 409, Laws of 1882); proper deductions being made for the liabilities of the savings bank.

Where assessors, in making an assessment of personal property, ascertain the amount of the owner's liabilities and make all deductions on account thereof to which he is entitled and assess him for the balance, he may not claim against the assessment so made another deduction of liabilities.

(Argued June 6, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 31, 1892,

Statement of case.

which affirmed an order of the Special Term dismissing a writ of certiorari.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

George Richards for appellant. By the laws of New York, incorporated savings banks, whether domestic or foreign, are exempt from taxation upon their personal property. (*M. Bank v. New York*, 121 U. S. 161; *People ex rel. v. Beers*, 67 How. Pr. 222; *Huntington v. Savings Bank*, 96 U. S. 389; Laws 1819, 66; Laws 1820, 82; Laws 1821, 151; Laws 1823, 283; Laws 1827, 170; Laws 1829, 85; 2 R. S. [8th ed.] 1082, 1083; *Catlin v. Trustees, etc.*, 113 N. Y. 133; *Davies on Taxation*, 91; *People v. Comrs.*, 104 N. Y. 249; *People v. Smith*, 88 id. 582; *People v. H. Ins. Co.*, 92 id. 339, 347; *W. C. Inst. v. City of Worcester*, 10 Cush. 128; *P. S. Inst. v. Gardner*, 4 R. I. 484; *N. S. Bank v. City of Nashua*, 46 N. H. 389; *M. Ins. Co. v. Supervisors*, 4 N. Y. 442; *S. M. Ins. Co. v. Mayor, etc.*, 8 Barb. 450; 8 N. Y. 241; *People ex rel. v. Board of Supervisors*, 16 id. 424; *People ex rel. v. Coleman*, 126 id. 433; *People v. E. T. Co.*, 96 id. 387; *People ex rel. v. Dayton*, 55 id. 378.) The act of congress (U. S. R. S. § 5219), the sole authority for any taxation of the national bank shares under the laws of a state, forbids state legislation which makes any broad and radical discrimination against this species of personal property as compared with other personal property generally. (*H. Ins. Co. v. Coleman*, 44 Hun, 47; *People v. Weaver*, 100 U. S. 539; *Stanley v. Supervisors*, 105 id. 305; *Boyer v. Boyer*, 113 id. 689, 701; *M. Bank v. New York*, 121 id. 138, 151; *Whitbeck v. M. Bank*, 127 id. 193; *Murray v. B. L. Ins. Co.*, 104 Mass. 586; 149 id. 1; *M. C. S. Bank v. City of Rochester*, 37 N. Y. 365.) The New York Bank Share Act (Laws of 1882, chap. 409, § 313) does not repeal exemptions nor make taxable upon federal securities persons or corporations which are otherwise exempted from personal property taxation by our laws. (*Bennett v. City of Buffalo*, 17 N. Y. 383; *Murray v. B. L. Ins.*

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Co., 104 Mass. 586.) Assuming that, under the laws of New York, savings banks are subject to a personal property tax, they must at all events be allowed to deduct from any assessment from taxation the amount of their liabilities which have not been used in connection with any other assessment for taxation. (Law of 1882, chap. 409, § 312; *People v. Weaver*, 100 U. S. 539; *Stanley v. Bd. Suprs.*, 100 id. 305; *Whitbeck v. M. Bank*, 127 id. 193; *Ruggles v. City of Fon du Lac*, 53 Wis. 436; *Matter v. Campbell*, 71 Ind. 512; *Wasson v. N. Bank*, 107 id. 206; *H. Ins. Co. v. Coleman*, 44 Hun, 47; *People ex rel. v. G. F. Ins. Co.*, 38 N. Y. 89; *N. Bank v. City of Richmond*, 42 Fed. Rep. 877; Laws of 1875, chap. 371, § 38; Laws of 1866, chap. 761; Laws of 1867, chap. 861.) Assuming again that, under the Laws of New York, savings banks are assessable upon their personal property, the deduction of their liabilities must be made from the assessment in question and not from something else. (2 R. S. [8th ed.] 1096, §§ 8, 9; *People v. Ryan*, 10 Abb. [N. C.] 37; 88 N. Y. 142; Laws of 1859, chap. 302, § 11; *Clark v. Norton*, 49 N. Y. 243; *Westfall v. Preston*, Id. 349; *People ex rel. v. Forrest*, 96 id. 544; *Apgar v. Hayward*, 21 J. & S. 357; *People ex rel. v. Comrs.*, 23 N. Y. 224; *People ex rel. v. Comrs.*, 1 T. & C. 611; *People v. Eq. T. Co.*, 96 N. Y. 387; *McLean v. Jephson*, 123 id. 142; *Bennett v. City of Buffalo*, 17 id. 383; *S. C. Co. v. S. P. R. Co.*, 118 U. S. 394; *Walling v. Michigan*, 116 id. 446; *People ex rel. v. Coleman*, 126 N. Y. 439.) The burden is upon the tax department to show a clear statutory authority for their action. (*McLean v. Jephson*, 123 N. Y. 146.)

George S. Coleman for respondent. An exemption of property accorded to the relator by the statutes of Connecticut does not avail to exempt its property in the State of New York. (*Catlin v. Trustees, etc.*, 113 N. Y. 133, 142; Laws of 1887, chap. 713.) There is no general or special statute of the State of New York under which the personal property of the relator within the state is exempted from taxation. (*Catlin v. Trustees, etc.*, 113 N. Y. 139; *People ex rel. v. Beers*,

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67 How. Pr. 219.) Even if a savings bank, as such, were not taxable, under the laws of this state, on its deposits and accumulations, it might still be liable to taxation as a stockholder in a national bank, without regard to the ownership of the shares. (*Bank of Redemption v. Boston*, 125 U. S. 60.) The assessment and taxation of the relator's bank stock was not made at a greater rate than that applied to other moneyed capital in the hands of individual citizens of this state. (Laws of 1882, chap. 409, § 312; Laws of 1880, chap. 596, § 3; *Stanley v. Bd. Suprs.*, 105 U. S. 305; *Whitbeck v. M. Bank*, 127 id. 193; *People ex rel. v. Coleman*, 44 Hun, 471; *McMahon v. Palmer*, 102 N. Y. 176; 133 U. S. 660; *M. Bank v. New York*, 121 id. 138; *W. N. Bank v. Parker*, 41 Fed. Rep. 402.)

EARL, Ch. J. This is a proceeding by certiorari to review an assessment of the relator, a Connecticut corporation, on shares of stock owned by it in certain banks located in the city of New York. There is no dispute about the ownership by it of the stock. It claims exemption from the assessment mainly because it is a savings bank, and also because, if allowed the proper deductions for its liabilities, nothing would remain for taxation.

It cannot claim exemption here on account of any laws of the state of Connecticut, as they have no operation here. We will assume that it is entitled to all the exemptions and regulations of the assessment and tax laws of this state, and that it must be treated precisely as if it were a domestic corporation, and yet we reach the conclusion that the assessment complained of was properly made.

The general rule is that all property within this state is liable to taxation, and when a claim of exemption is made, it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption.

It is provided in section 1, title 1, chapter 13, part 1 of the Revised Statutes, as follows: "All lands and all personal estate within this state, whether owned by individuals or by

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corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." And among the exemptions afterwards specified is "the personal estate of every incorporated company not made liable to taxation on its capital in the fourth title of this chapter." In order to claim this exemption, a corporation must have a capital not liable to taxation as such, and so we decided in *Catlin v. Trustees of Trinity College* (113 N. Y. 133). There we held that the words "incorporated company" were intended to designate only such business and stock corporations as, by chapter 13, are, under special circumstances, exempted from taxation on their capital, and do not embrace corporations not having a capital. The reasoning by which that conclusion was reached need not be repeated here. Nothing is left to be said by the opinion there pronounced. Therefore, looking at the Revised Statutes alone, there is nothing upon which the relator can base the exemption claimed.

The Revised Statutes neither exempted the bank nor the depositors therein. But there could not be double taxation. If that had been attempted, some way would have been found to defeat it, as that would be against public policy, the purpose of the laws and natural justice. While the legislature may constitutionally impose double taxation, its purpose to do so can never be inferred, but must plainly appear. The bank is in some sense a trustee of the depositors, and takes their money and invests it, and pays them the net interest which it earns, and it cannot be supposed that there is any system of laws under which taxation can, at the same time, be imposed upon a trustee and the beneficiary in respect of the same property. (*Provident Savings Institute v. Gardiner*, 4 R. I. 484; *Nashua Savings Bank v. City of Nashua*, 46 N. H. 389, 398.)

The system for the taxation of savings banks and their depositors under the Revised Statutes was undoubtedly imperfect. It may be that either the bank or the depositors could be taxed and undoubtedly it would have been most appropriate to select the bank for taxation.

Thus the law remained until 1857, when the act chapter 456, "in relation to the assessment of taxes on incorporated companies," was passed, the fourth section of which is as follows: "The deposits in any bank for savings which are due to depositors and the accumulations in any life insurance company organized under the laws of this state, so far as the said accumulations are held for the exclusive benefit of the assured, shall not be liable to taxation other than the real estate and stocks which may be owned by such bank or company and which are now liable to taxation under the laws of the state." Now what does that section mean and what did the legislature intend to accomplish by it? The whole act deals with "incorporated companies;" so the title indicates. The section plainly intended either to exempt depositors from taxation upon their deposits or to exempt the banks from taxation upon such deposits. We think the legislature found the confusion existing in the laws as to the taxation of such deposits, and that the taxation might be imposed upon the banks where they were located, or upon the depositors where they resided, neither the banks nor the depositors having any exemption, and it intended to exempt the banks from taxation upon such deposits to which they were then liable. That it was providing for the exemption of the banks as to the deposits is made probable by the circumstances that in the same section consisting of but one sentence it provided for the exemption of life insurance companies from taxation upon their accumulations held for the benefit of persons insured, and that the real estate and certain stocks owned by the corporations are expressly left liable to taxation as before. There is no language indicating that it was meant to exempt the depositors from taxation upon their deposits. If, as claimed by the relator, the banks are exempted from taxation under the Revised Statutes and as claimed by others the depositors are exempted from taxation on their deposits under this section, then an increasing amount of personal property in this state, now amounting to more than \$600,000,000, will entirely escape taxation. There is certainly no public policy which dictates the entire

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exemption of this enormous amount of property, and the intention to exempt it, before the exemption can be allowed, should be found plainly expressed in some statute, and we do not find it. The depositors are taxable upon their deposits as they are upon other personal property, and the banks are exempt to the extent specified in the section.

The exemption was only to the extent of the deposits due to depositors. The surplus held by savings banks not being due to depositors, and therefore not taxable against them, was left where it was before, liable to taxation against the banks. But it was found that the banks escaped taxation upon the surplus by investing it in government bonds which were exempt from taxation, and hence in 1866 the legislature, in section 7 of the act chapter 761, provided for the taxation of the banks on their "privileges and franchises," to an amount not exceeding the gross sum of their surplus. In 1867 this section was amended so as to allow a deduction from the surplus of the amount thereof invested in United States securities. (Chapter 861.) In 1875, by section 56 of chapter 371, the legislature repealed the acts of 1866 and 1867, and thus the law was again restored to the condition in which it was left by the act of 1857, and so the law remained until 1882 when by chapter 402 the act of 1875 was repealed. It may be that this repeal of the act of 1875 restored the acts of 1866 and 1867. It is, however, not now necessary to determine whether it did or not as those acts providing for the taxation of the privileges and franchises of savings banks manifestly could have no application to foreign savings banks.

No other statutes have come to our attention which bear upon the exemption of savings banks and their depositors from taxation, and our conclusion is that the only exemption which the banks can claim is under the act of 1857, and that that exempts only the deposits due to their depositors, and not their surplus, and that hence there is room for the operation of the provisions of law which impose taxation upon the shares of bank stock. Those provisions are found in section 5219 of the Revised Statutes of the United States, and in the

laws of this state, section 312, chapter 12 of the act chapter 409 of the Laws of 1882. In the latter act it is provided that the stockholders in every bank, state or national, shall be assessed and taxed on the value of their shares of stock at the place where the bank is located; and that such shares shall be assessed like other taxable personal property owned by individuals and with like deductions. Section 312 is mandatory. It provides that the stockholders "shall be assessed and taxed." It may, at least plausibly if not well, be claimed that a corporation owning bank shares may be taxed upon them although generally exempt from taxation as to its other personal property. (*Bank of Redemption v. Boston*, 125 U. S. 80.) But we need not go so far in this case, because if these shares are part of the surplus of this bank, and the proper deductions have been allowed, it has no ground of complaint. The assessors determined upon sufficient, and indeed undisputed, evidence that they were part of the surplus, and we cannot perceive how it can be well disputed that every deduction which the bank could properly claim was made. The assessors took the total value of all its assets, and from that deducted all its liabilities, and thus ascertained that it had a surplus of over \$900,000. From this surplus they deducted all its property not taxable anywhere, all its property taxable elsewhere, all real estate and cash held by it, and thus reached a final surplus largely in excess of the assessment made against the bank. It is impossible to perceive what other deductions the assessors should have made, and the learned counsel for the bank has called to our attention no other.

But he claims that the bank was entitled to a deduction of its liabilities from the assessment as made. The bank was not entitled to the deduction of liabilities twice. When the assessors, in making an assessment of personal property, ascertain the amount of the owner's liabilities and make all the deductions on account thereof to which he is entitled, and assess him for the balance thus obtained, he cannot then again claim against the assessment thus made another deduction of his liabilities and thus entirely wipe out the assessment. Assessors

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may assess an owner for the whole amount of his personal property and then allow him deductions on account of his liabilities when he appears and claims it, or they may allow him the deductions when they make the assessment, and then he has no grievance to complain of.

Our conclusion, therefore, after a careful consideration of the learned and ingenious brief of the counsel for the bank, is that the assessment against it was properly made, and that it has no just ground to complain of the amount thereof, and the order appealed from should, therefore, be affirmed, with costs.

FINCH, J., concurs; ANDREWS, PECKHAM, GRAY, O'BRIEN and MAYNARD, JJ., concur in result on the ground that the shares of stock assessed were part of the bank's surplus, and they express no opinion as to the taxation of depositors on account of their deposits in savings banks.

DAVID A. LAMMING, Appellant, v. NORMAN H. GALUSHA
et al., Respondents.

A plaintiff having a cause of action which entitles him to an injunction restraining the unlawful maintenance and operation of a railroad in a street in front of his premises, by reason of its continuous interference with his rights of property, may unite with a demand for such equitable relief and for damages, because of such interference, a claim for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway.

While the injuries are distinct in character, they both proceed in a general sense from the same wrong and are "transactions connected with the same subject of action," within the meaning of the Code of Civil Procedure (§ 484), authorizing the union of two or more of such causes of action in one complaint.

An allegation of negligence on the part of the defendants in the operation and management of a train, which the complaint alleges caused the special injury is not necessary, as the unauthorized and continuous obstruction of the highway is a public nuisance, and a person sustaining a special injury therefrom is entitled to recover his damages, irrespective of the question of negligence at the time of the injury.

Lamming v. Galusha (53 Hun, 32), reversed.

(Argued June 6, 1892; decided October 4, 1892.)

Statement of case.

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which reversed an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and sustained a demurrer to the complaint.

The nature of the action and the facts, so far as material, are set forth in the opinion.

Henry W. Conklin for appellant. So far from setting forth a cause of action for negligence, improperly joined with one for the maintenance of a nuisance, no negligence is pleaded by plaintiff. This is a point decisive of the case and must have been overlooked by the General Term. (*Sullivan v. N. Y., N. H. & H. R. R. Co.*, 1 Civ. Pro. Rep. 289; *Trenndlich v. Hall*, 7 id. 62; *Good v. Daland*, 122 N. Y. 1; *Congreve v. Smith*, 18 id. 79; *Irvine v. Wood*, 51 id. 228; *Clifford v. Dam*, 81 id. 56.) Only one cause of action is set forth in the complaint. (*Lynch v. M. E. R. Co.*, 129 N. Y. 274; *Fanning v. Osborne*, 34 Hun, 121; *F. P. B. Co. v. Smith*, 30 N. Y. 44, 62; *Clarke v. Blackmar*, 47 id. 150, 153; *Crooke v. Anderson*, 23 Hun, 266; *Farrell v. Mayor, etc.*, 20 N. Y. S. R. 12; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98, 123; *Callanan v. Gilman*, 107 id. 360; *Heeg v. Licht*, 80 id. 579; *Messenger v. M. R. Co.*, 129 id. 502.) If the complaint can be construed as setting forth two or more causes of action, they are properly united for the reason that they are brought "upon claims arising out of the same transaction or transactions connected with the same subject of action." (Code Civ. Pro. § 484, subd. 9; *Shepard v. M. R. Co.*, 117 N. Y. 442; *Howe v. Peckham*, 10 Barb. 656; *Rosenberg v. S. I. R. Co.*, 38 N. Y. S. R. 106; *Wiles v. Suydam*, 64 N. Y. 173; *Adams v. Popham*, 76 id. 410; *Leonard v. Spencer*, 108 id. 338; *Chapman v. City of Rochester*, 110 id. 273; *McCrea v. N. Y. E. R. R. Co.*, 13 Daly, 302.)

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Cassius C. Davy for respondent. The defendants are not deprived of the right to demur by the fact that plaintiff has united all the causes of action in one count, or by reason of the fact that two causes of action are not separated or stated to be independent of each other, and they are not separately numbered. (*Golding v. Utley*, 60 N. Y. 427; *Wiles v. Suydam*, 64 id. 173; *Stanton v. M. P. R. Co.*, 15 Civ. Pro. Rep. 296.) There is a misjoinder of causes of action shown by the complaint. (Code Civ. Pro. § 484; *N. Y. & H. R. R. Co. v. Schuyler*, 17 N. Y. 582; *Sullivan v. N. Y., N. H. & H. R. R. Co.*, 1 Civ. Pro. Rep. 285; *Teal v. City of Syracuse*, 32 Hun, 332; *Townsend v. Coon*, 7 Civ. Pro. Rep. 52; *Taylor v. M. E. R. Co.*, 20 J. & S. 299.) The causes of action set up in the complaint in the case at bar did not arise out of the same transaction. (Pom. on Rem. 505; *Francis v. Schoellkopf*, 53 N. Y. 152; *Butler v. Kent*, 19 Johns. 223; *Olmstead v. Brown*, 12 Barb. 657, 662; *Moody v. Baker*, 5 Cow. 351, 359; *Kendall v. Stone*, 5 N. Y. 15, 20; *Addington v. Allen*, 11 Wend. 375, 412; *Clark v. Brown*, 18 id. 212, 229; *Williams v. D. & L. R. Co.*, 39 Hun, 430, 433; *Whitmore v. Bischoff*, 5 id. 176; 101 N. Y. 117; *Curtis v. R. & S. R. Co.*, 18 id. 534.)

ANDREWS, J. The question presented by the demurrer is whether in an action for maintaining a nuisance in constructing and operating a steam railroad in a public highway without authority, brought by the owner of lands injuriously affected by the road, and whose property rights are invaded thereby, in which the plaintiff demands relief by way of injunction and special damages to his real property, occasioned by the nuisance, he may claim in the same action damages for a personal injury sustained from the operation of the road, without negligence on his part, from being thrown from a wagon while driving along the highway on which the railroad was constructed, in consequence of his horses being frightened by the noise of a passing engine and train, and escaping from his control.

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The demurrer is for an alleged misjoinder of these causes of action. The allegations in the complaint relating to the personal injury are not separated from the other allegations therein relating to the injury to the real property, so as in form to constitute a separate cause of action, but are blended with them. But a defendant is not deprived of the right to demur to a complaint for misjoinder of causes of action distinct in themselves, and which cannot be united because they are not separately stated or numbered. (*Golding v. Utley*, 60 N. Y. 427.) It is well settled that any unauthorized and continuous obstruction to a public highway constitutes a public nuisance (DENIO, J., *Davis v. Mayor, etc.*, 14 N. Y. 524), and an action for damages lies in favor of any person sustaining a special injury in his person or property therefrom against the party who erected or maintained it. There can be no doubt that the plaintiff could have brought an ordinary legal action for damages for personal injury based upon the allegations in the complaint. The complaint contains no allegation of negligence on the part of the defendants in the operation or management of the train at the time of the alleged injury. Nor was this necessary. Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in creating or maintaining it, and the negligence of the defendant, unless in exceptional cases, is not material. (*Congreve v. Smith*, 18 N. Y. 82; *Clifford v. Dam*, 81 id. 56. The General Term seems to have been under a misapprehension in supposing that the complaint set out a cause of action for the physical injury of the plaintiff, based on negligence. This was not the gravamen of the complaint) The complaint alleges the unlawful obstruction of the highway, and then follows an enumeration of the injuries sustained by the plaintiff to his real property by reason of the nuisance, and of the physical injury, stating time, place and circumstances. If the sole cause of action was the personal injury, the plaintiff would be confined to the ordinary action for damages and could not maintain a claim for equitable relief by

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injunction. In that case the legal remedy for the wrong suffered by the plaintiff would be complete and adequate. An action by a private person to restrain the continuance of a public nuisance will only lie when the nuisance and the injury suffered are continuous, affecting the value of his property or the exercise of his personal rights, or impairing his health and comfort in connection with the enjoyment of property. In such case to prevent multiplicity of action and to give final relief, he may invoke the equitable power of the court. But the possibility that a traveler injured on the highway by a railroad train unlawfully thereon may, on some future occasion, be subjected to a similar injury, does not entitle him to maintain an action for an injunction. But the question here is whether a plaintiff having a cause of action which entitles him to an injunction restraining the maintenance and operation of the railroad by reason of its continuous interference with his rights of property may unite with the demand for equitable relief by injunction and for damages for such interference, a claim for damages for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway; or in other words, whether he may unite in a single action all his claims, legal and equitable, which arise in consequence of the same general cause, viz., the nuisance maintained by the defendant. This is a question of procedure governed by the course and practice of the court, or by the statute, if made the subject of statute regulation.

We are of opinion that the causes of action were properly united under section 484 of the Code of Civil Procedure, which authorizes the plaintiff to unite in his complaint two or more causes of action, whether such as were formerly denominated legal or equitable, or both, in the cases specified, and among others: "Sub. 9. Upon claims arising out of the same transaction or transactions connected with the same subject of action and not included within one of the foregoing subdivisions." The subject of the action in this case was the injury committed by the defendant in maintaining a public nuisance which subjected the plaintiff to injuries specified,

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viz.: Injury to real property and personal injury. The injuries were distinct in character, and while the injury to the real property was continuous, a physical injury was consummated when first inflicted. But they both proceeded in a general sense from the same wrong, the unlawful obstruction of the highway by the defendant, and they were all, we think, "transactions connected with the same subject of action" within the meaning of section 483, and may properly be redressed in a single action. This conclusion is in harmony with the general principle of equity jurisprudence, which aims at complete and final relief in a single action in respect of all matters between the same parties, growing out of the same general transaction. It is supported by the significant language of the court in *Chapman v. City of Rochester* (110 N. Y. 276), which was an action to restrain the pollution of a stream and for damages. DANFORTH, J., said: "Moreover the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled not only to compensation for damages thereby occasioned, but also to such judgment as will prevent the further perpetration of the wrong complained of." (See also *Shepard v. Man. Rway. Co.*, 117 N. Y. 442.) These views lead to a reversal of the judgment of the General Term and an affirmance of the judgment of the Special Term, with costs.

All concur.

Judgment accordingly.

Said judgment was amended by order entered October 28, 1892, by adding thereto the following: "With leave to the defendants to withdraw their demurrer and answer within twenty days after filing of the remittitur in the Supreme Court, entry of an order or judgment thereupon and service of a copy thereof with notice of its entry, upon payment by the defendants to the plaintiff of costs of the General Term of the Supreme Court, and of this court."

Statement of case.

In the Matter of the Application of JOHN E. CORWIN for a Writ of Certiorari, Directed to the Assessors and Clerk of the City of Middletown, Orange County.

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The act of 1890 (Chap. 269, Laws of 1890), "to provide for the review and correction of illegal, erroneous or unequal assessments," regulates the review of assessments in towns, cities and villages by certiorari, and renders inapplicable to such cases the general provisions of the Code of Civil Procedure (§§ 2127 *et seq.*) relating to the writ; under said act, if a case is brought within it, the granting of the writ is not discretionary, but the petitioner is entitled to it as a matter of right.

People v. Board of Tax Commissioners (85 N. Y. 655); *People ex rel. v. McCarthy* (103 id. 630), distinguished.

The time allowed by said act (§ 9) within which a party seeking to review an assessment may apply for a certiorari, *i. e.*, fifteen days after notice of the final completion, verification and delivery of the roll, may not be abridged by any action or omission to act upon the part of assessors or the common council of a city.

Where no such notice has been given, the time within which application for the writ may be made is unlimited.

The petition, on application, under said act, for a certiorari to review an assessment, is in the nature of a pleading, and only conclusions of fact need be stated; not the evidence necessary to support them.

The charter of the city of Middletown (§ 5, tit. 4, chap. 535, Laws of 1888) requires the assessors to make up the assessment-roll, give notice of the meeting for hearing of grievances, correct the roll and deliver it to the city clerk on or before the third Tuesday of July. Upon an application, under said act of 1890, for a certiorari to review the action of the assessors of said city in assessing the property of the relator for the year 1891, it appeared that, on June eighteenth, they gave notice that they had completed the roll and left a copy of it with the city clerk where it could be examined until July tenth, when they would meet to review the assessments on application of anyone aggrieved. The assessors met on July tenth, heard complaints, and on July sixteenth swore to the roll and filed it with the city clerk; on the same day the common council adopted a resolution confirming it. It did not appear that any notice of the final completion and delivery of the roll was given. *Held*, that the relator was not concluded by the action of the common council; and that, in the absence of notice, the time for applying for the writ was unlimited.

People ex rel. v. Assessors of Niagara (40 Hun, 228), so far as it may be construed to hold that the writ cannot issue in any case after the assessors have parted with the roll, disapproved.

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The General Term quashed the writ on the ground that the relator appeared, on the day appointed for hearing of grievances, by attorney, and not in person. No such objection was made by the assessors; they received and filed the attorney's affidavits, interrogated him in reference to the grievance complained of, took an admission from him which rendered the examination of the relator unnecessary, and gave the attorney notice of their final action. *Held*, that the decision was error.

The grievance complained of was that the assessment of the relator's personal property was unequal; the petition alleged that all the other assessments upon the roll were made at a lower proportionate valuation than the assessment of relator's property; that his assessment was wholly out of proportion to the basis of valuation adopted by the assessors in making other assessments, and did not conform to the valuations and assessments applied by them to other personal property. The relief sought was that the assessment be corrected so as to conform to the valuations of other personal property, and so as to secure equality of assessment. *Held*, that the petition was sufficient.

In re Corwin (64 Hun, 167), reversed.

(Argued June 7, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 9, 1892, which reversed an order of Special Term, denying a motion to quash a writ of certiorari.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

William Vanamee for appellant. In construing the act the courts have simply said that it is unfair to invoke the aid of the court unless the complaining party has first made known his grievance to the assessors. (*People ex rel. v. Coleman*, 41 Hun, 307.) The point that the appearance and affidavit of the attorney before the assessors, and his offer to submit to an examination were ineffectual to set the assessors in motion, is a pure afterthought on the part of the attorney for the assessors. (*People v. Bd. Assessors*, 40 N. Y. 155; *People v. Zoeller*, 15 N. Y. Supp. 634.) The circumstances of this case make the remedy of the statute peculiarly applicable, and it affords the only remedy open to the relator. (*People ex rel. v. Carter*, 109 N. Y. 576.)

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Henry W. Wiggins for respondent. The conclusion of the General Term was correct; the relator not having appeared in person to permit an oral examination by and before the assessors, failed to comply with the provisions of the statute. (*People ex rel. v. Forrest*, 96 N. Y. 544.) The relator having failed to appear in person, as provided by chapter 176 of the Laws of 1851, as amended by chapter 536 of the Laws of 1857, disregarded a duty that the courts have held to be a condition to an action or proceeding against the assessors. (*Vase v. Willard*, 47 Barb. 320; Laws of 1889, chap. 269; *People v. W. S. Bank*, 39 Hun, 525; *People v. Adams*, 125 N. Y. 471; *People v. Dolsen*, 126 id. 166; Laws of 1871, chap. 176, § 6.) A case must first be made out before the assessors on review day, and it is necessary and important that the case presented, must be accompanied or supported by proof actual, tangible, real, so that that tribunal, the assessors, may intelligently act and render judgment on it. Unless this is done, there is nothing giving the right to a review through the courts. (*People v. Bd. Suprs.*, 15 Barb. 613.) There is no irregularity or legal error in the assessment under the general statutes, which apply to this assessment, except as modified by section 5, chapter 535, Laws of 1888. (*People v. Hauff*, 104 N. Y. 380.) If everything alleged in relator's application had been properly sworn to and all the allegations therein on information and belief, had been established by proof, and ample evidence and testimony were now before the court to establish or confirm the same, then the General Term order quashing the writ should be sustained. (*People ex rel. v. Carter*, 109 N. Y. 576.) The writ was not properly issuable to the assessors as they had lost entire control over the roll, and for that reason, the writ, so issued to them, must be quashed. (*People v. Fredericks*, 48 Barb. 173; 40 N. Y. 70; *People v. Tompkins*, 40 Hun, 228; *People v. Comrs. of Taxes*, 9 id. 609; *People v. Reddy*, 43 Barb. 540; *People ex rel. v. Delaney*, 49 N. Y. 655; Laws of 1888, chap. 535, § 6; *People v. Bd. Suprs.*, 92 N. Y. 275; *People v. Bd. Police*, 82 id. 506.) The appeal should be dismissed.

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The order appealed from being discretionary is not reviewable in this court. (Code Civ. Pro. §§ 190, 1337, 2127; *People v. Tax Comrs.*, 85 N. Y. 655; 86 id. 639; *People v. McCarthy*, 102 id. 660.

MAYNARD, J. The relator obtained *ex parte* a writ of certiorari at Special Term, under the act of 1880 (Chap. 269, Laws of 1880), to review the action of the assessors of the city of Middletown in making up their assessment-roll for the year 1891.

The principal ground of error complained of, and the only one now insisted upon, was the inequality of his assessment of personal property, compared with the property assessments of other taxpayers of the city. Upon the return to the writ the respondents made a motion to quash, which was denied, and an order of reference granted to take proofs upon the matters in issue. The General Term reversed the order of the Special Term, denying the motion to quash and dismiss the writ, and granted the motion, with costs; and the case is now here upon an appeal from that order.

The order is silent as to the grounds upon which it was made, but it appears from the opinion of the court, that the writ was quashed, because the relator did not personally appear before the assessors upon the day for hearing grievances, but appeared by attorney, which was considered insufficient to entitle him to a review under the act of 1880.

The respondents contend that the order of the General Term is not appealable, for the reason that it was discretionary and, therefore, not reviewable by this court; and cite the provisions of the Code (§§ 190, 1337, 2127) and *People, etc., v. Board of Tax Comrs.* (85 N. Y. 655) and *People, etc., v. McCarthy* (102 id. 630).

But these were cases of the allowance of a common-law writ of certiorari; the granting or refusal of which by the Supreme Court has always been held to be so far discretionary that an order of that court quashing the writ, is not reviewable here, unless it affirmatively appears that the discretion of the court

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was not exercised in granting it. Section 2127 of the Code merely embodies the pre-existing practice of the courts upon the subject. But this is a statutory proceeding under an act passed after the provisions of the Code are to be deemed to have been enacted (§§ 3315, 3356), and it was held by this court in *People, etc., v. Assessors of Greenburgh* (106 N. Y. 671) that this act regulates the review of assessments in towns, cities and villages by certiorari, and renders inapplicable to such cases the general provisions of the Code relating to such proceedings. It was designed to afford a remedy where none before existed, or where the previous remedy was, at the best, inadequate; and if the taxpayer brings his case within the statute, the granting of the writ is not discretionary, but he is entitled to it as a matter of right.

The objection is also urged, that the application for the writ was not made in time. The charter of the city of Middletown (§ 5, tit. 4, chap. 535, Laws of 1888) required the assessors to make up the assessment-roll; give notice of the meeting for the hearing of grievances; correct the roll and deliver it to the city clerk on or before the third Tuesday of July. The record shows that on June eighteenth they gave notice that they had completed the roll for the year 1891 and left a copy with the city clerk, where it might be seen and examined by any person interested, until July tenth, on which day they would meet to review their assessments, on the application of any person aggrieved. On July tenth they met and heard the complaints of parties deeming themselves aggrieved, and on July sixteenth made oath to the roll and filed it with the city clerk, and on the same day the common council adopted a resolution confirming it.

Section nine of the act of 1880, provides that when the assessors shall have finally completed and verified their roll, they shall deliver it to the city clerk; and that it shall remain with such clerk for a period of fifteen days for public inspection; and that the assessors shall forthwith give public notice of the final completion of the roll, the officer to whom it has been delivered, and the place where it will be open to the public

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inspection; but it does not appear that these requirements of the law were observed in the present case. It is further provided that application for the writ must be made within fifteen days after the completion and delivery of the roll and the giving of such notice, but that such time shall not begin to run until such notice is given. Nothing which the assessors or the common council might do, or omit to do, would be available to abridge the time within which the relator might, under the statute, apply for judicial redress. If the notice was not given, it has been held that such time was unlimited. (*People, etc., v. Haupt*, 104 N. Y. 377.) The authorities cited by respondent's counsel are cases which arose before the enactment of the law of 1880. Under the practice then prevailing, the writ must have been sued out and served upon the assessors, before they had parted with the roll; which was generally impossible, as the roll would be completed and delivered on the same day, as it was in this case. The taxpayer could not anticipate the action of the assessors, and service of the writ upon them before they had entered the judgment sought to be reviewed, would be premature. This was one of the evils undertaken to be remedied by the legislation of 1880, which requires the assessment-roll to remain *in suspenso* for the purposes of review, for the period of fifteen days after notice is given of its completion and delivery. In *People, etc., v. Assessors of Niagara* (40 Hun, 228) it seems to have been held that it was too late to apply for the writ after the assessors had delivered the roll to the supervisor of the town, and after its delivery by him to the board of supervisors. The opinion of the court does not refer to the act of 1880, and its provisions do not appear to have been considered, and there is nothing to indicate whether the fifteen days limitation had not actually expired. The cases referred to in the opinion, either arose before the passage of the act, or are cases of special assessments, and so far as the decision may be construed to hold that the writ cannot issue in any case after the assessors have parted with the roll, it is in conflict with the plain provisions of the statute and cannot be approved.

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The relator was not concluded by the action of the common council in confirming the assessment-roll. That body has no power under the city charter, to correct the roll, except such as is possessed by boards of supervisors with respect to town assessment-rolls, and, hence, it could not afford the relator the relief to which he claims to be entitled.

The General Term quashed the writ in this case for the reason that the relator appeared before the assessors upon the day appointed for the hearing of grievances by attorney and not in person. No such objection was made by the assessors at the hearing. They recognized the appearance of the attorney; received and filed his affidavit; interrogated him upon the subject of his client's grievance; took an admission from him, which rendered an examination of the relator unnecessary; made a reduction in the real property assessment and gave the attorney notice of their final action and it might properly be held that they had waived any objection of that character; even if it would have had any force, had it been promptly made. (*People v. Hicks*, 40 Hun, 598.)

Whatever effect might be given to the failure of the tax payer to appear before the assessors at their last meeting and there seek a correction of his assessment, the point is not involved upon this appeal. Under chapter 176 of the Laws of 1851, as amended by chapter 536 of the Laws of 1857, it may be that in a proper case the assessors might insist upon his personal appearance and examination, if necessary. If he is seeking to escape taxation because he does not possess taxable property of the value fixed by them, or because of non-residence, or for some other reason, which is peculiarly within his personal knowledge there might be great propriety in requiring him to appear in his own person in order that the assessors might probe his conscience by an examination under oath as to the extent of his possessions, or as to any other material fact of which he alone may be able to give the most reliable information. They cannot be compelled to act upon hearsay testimony, but have the right to demand the best evidence obtainable. But even in such cases, if a personal

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appearance is impracticable on account of unavoidable absence, or sickness or other sufficient cause, the taxpayer cannot be denied the opportunity to present his grievance by attorney, with the proofs to support it. Here there was a sufficient appearance by attorney. He admitted the existence of all the facts, which it was material for them to know, with respect to the relator's property, and they did not ask or require a personal appearance or examination, for the obvious reason that it would be the performance of an idle ceremony. He, therefore, omitted nothing which, under any reasonable construction of the tax law, he was bound to do in order to invoke the remedy provided in the act of 1880.

Objection is made to the sufficiency of the petition upon which the order for the writ was granted, which we think is based upon a misconception of the office of a petition in such a proceeding. It is in the nature of a pleading and only conclusions of fact need be stated, and not the evidence necessary to support them. The statute says that the writ may be allowed on the duly verified petition of the taxpayer when the petition shall set forth that his assessment is unequal, in that it has been made at a higher proportionate valuation than other property on the same roll and that he will be injured by such unequal assessment. It may well be questioned whether an averment in the petition in the words of the statute would not be sufficient to confer jurisdiction (*Rochester R. Co. v. Robinson*, 133 N. Y. 242), but this petition goes farther and alleges that all the other assessments upon the roll are made at a lower proportionate valuation than the assessment of relator's property, and that his assessment of personal property is wholly out of proportion to the basis of valuation adopted by the assessors in making the other assessments on the roll, and bears no relation to their general method and system in arriving at their assessments of personal property, and does not conform to the valuations and assessments applied by them to other personal property.

His demand for relief is that his assessments be declared unequal and be corrected in such manner as shall be in accord-

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ance with law, and so as to make them conform to the valuations of other property on the roll, and so as to secure equality of assessment. He is not seeking to obtain a reduction of his assessment by showing that in a single instance, or that even in occasional instances, other property has been assessed proportionately lower, which this court held in *People, etc., v. Carter* (109 N. Y. 576) would not entitle him to the remedy provided in the act of 1880; but he proposes to bring himself within the rule laid down by Judge ANDREWS in that case, which requires him "to show a state of facts from which a presumption justly arises that the inequality of which he complains will subject him to the payment of more than his just proportion of the aggregate tax."

The order of the General Term should be reversed and the order of the Special Term affirmed.

All concur.

Ordered accordingly.

In the Matter of the Application of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, to Acquire Title to Wharf Property, etc., and Lands Under Water between 34th and 35th, 35th and 36th, and 41st and 42d Streets, and 12th and 13th Avenues.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY et al., Appellants.

To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state and through it by the municipality which governs and controls the port.

The only standard by which to judge of the extent of the duty is the necessities of the business.

Where a permanent pier and an exclusive right to its use is a necessity of large steamship lines, without which business cannot properly be transacted, the duty rests upon the state or the municipality to provide such accommodations or to permit the companies to obtain them from private owners.

Where this duty has been imposed by the state upon a municipality and it has undertaken its performance, all appropriate acts done by it in such performance are for a public purpose.

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Lands therefore required by a municipality, upon which such a duty has been imposed, for the construction of piers and wharves are required for a public use and may be taken under the right of eminent domain, although some portion may thereafter in the discretion of the municipality be divided off and placed in the exclusive possession of a lessee, to be used solely in the transaction of necessary business connected with the transportation of passengers and freight.

Accordingly, *held*, that the provision of the New York Consolidation Act (§ 715, chap. 410, Laws of 1882) authorizing the department of docks to acquire for the benefit of the city title, by proceedings *in invitum*, to any and all wharf property in the city not owned by it included in the plans adopted in pursuance of the provisions of the act of 1870 (Chap. 137, Laws of 1870), as amended by the act of 1871 (Chap. 574, Laws of 1871), is not rendered unconstitutional by the fact that the city is authorized in its discretion to lease its piers or to give the exclusive use of some of them for special kinds of commerce (§ 716).

Also, *held*, that a sufficient grant of power was given by said provision to include in condemnation proceedings property of the nature described, used by a railroad or gas company for landing freight or other property.

It is not necessary in such proceedings to show that the land proposed to be taken is required for the purpose of building any particular pier, dock or bulkhead; if required in order to enable the city to carry out its general plan, the statute permits its acquisition.

While property already devoted to a public use, will not be regarded as subject to the right of condemnation for another public use unless the right is plainly granted by statute, it is not necessary that the statute should so in terms enact, it is sufficient if the right is conferred by necessary implication from the language used.

(Argued June, 7, 1892; decided October 4, 1892.)

APPEALS from orders of the General Term of the Supreme Court in the first judicial department, made April 14, 1892, which affirmed orders of the Special Term appointing commissioners of estimate in a proceeding to acquire title to certain lands in the city of New York.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Henry H. Anderson for appellant. The legislature has in the act in question declared uses to which the property may be put when acquired, which are not public and cannot be supported by the exercise of the power of eminent domain.

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(§ 716, Con. Act of 1882; *In re N. F. & W. R. R. Co.*, 108 N. Y. 375; *In re U. F. Co.*, 98 id. 3; Cooley on Const. Lim. 669; *In re E. B. W. & M. Co.*, 96 N. Y. 42; *Varnum v. Martin*, 21 W. V. 534-556; *Wild v. Dieg*, 43 Ind. 455-461; *Scholl v. G. C. Co.*, 118 Ill. 427; *S. Co. v. Brown*, 7 W. V. 199; *W. R. B. Co. v. Dix*, 6 How. Pr. 507; Lewis on Em. Domain, § 175.) The property has already been devoted to and is actually occupied for a public use, and cannot be condemned to another public use under the general law of the legislature. (*P. P. R. R. Co. v. Williams*, 91 N. Y. 552; *In re B. & A. R. R. Co.*, 53 id. 574; *L. S. & M. S. R. Co. v. C. & W. J. R. R. Co.*, 97 Ill. 506; *In re City of Buffalo*, 68 N. Y. 167; *In re N. Y. & B. B. R. R. Co.*, 20 How. Pr. 201.) The condition precedent to this application has never been performed. (*Craig v. Town of Andes*, 93 N. Y. 405.) The right to condemn, under this statute, is limited to cases where the necessity for acquirement appears upon the commissioners' map or plan of 1871, approved by the commissioners of the sinking fund. (Laws of 1882, chap. 410, §§ 712-716.) It is plain that the effect of the act is only to transfer the ownership of the property from the appellant to the corporation of New York without changing, so far as the public is concerned, the use at all. It is not taken for a public use. It is appropriated now to the public use in the widest sense. The right to collect the wharfage is largely in private individuals. If taken, the right to collect wharfage will be in the corporation. (*In re E. B. W. & W. Co.*, 96 N. Y. 42.)

Charles Blandy for respondent. The negotiation made with the New York Central and Hudson River Railroad Company, and the failure by that corporation to respond to the offer of the dock department, constituted an inability to agree upon a price. (Laws of 1882, chap. 410, § 715.) The appellant having raised no issue of fact to be tried and the answer containing nothing but preliminary objections, they became questions of law and were properly overruled and the order appointing commissioners was properly made. (Code Civ.

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Pro. §§ 500, 522, 3357, 3384; *Bennett v. L. M. Co.*, 110 N. Y. 150; *Marston v. Swett*, 66 id. 210; *Swinburne v. Stockwell*, 58 How. Pr. 312; *Clark v. Dillon*, 97 N. Y. 370; Abbott's Trial Brief, § 570.) Under the provisions of section 715 of the Consolidation Act, no negotiations to agree upon a price are necessary with a lessee or assignee of a lessee of the property rights sought to be acquired. (*In re R. H. & L. R. R. Co.*, 110 N. Y. 129.) The property rights authorized to be extinguished are described in section 712 of the Consolidation Act. The negotiations by the dock department fulfills the requirements of the law. (Laws of 1882, chap. 410, §§ 712, 715; *Dyckman v. Mayor, etc.*, 5 N. Y. 434; *Kiernan v. Mayor, etc.*, 79 id. 514; *In re R. H. & L. R. R. Co.*, 110 id. 129.) There is no force in the contention of the appellant that the plan, as evidenced by the map between pages 44 and 45, did not contemplate the taking of appellant's property. (Laws of 1882, chap. 410, § 712.) The new plan of the dock department contemplating the construction of the new bulkhead, 150 feet west of the westerly line of Twelfth avenue and the construction of new piers at the foot of Forty-first and Forty-second streets, respectively, cannot be carried into effect without first acquiring all the rights of the appellant. (*Kingsland v. Mayor, etc.*, 110 N. Y. 578.) The fact that the appellant is a corporation engaged in supplying gas under contract with the city authorities for lighting the lamps does not make it a public corporation. (*In re N. Y. C. & H. R. R. Co. v. M. G. Co.*, 63 N. Y. 326; *In re Dept. of Public Parks*, 53 Hun, 278; *In re Munson*, 39 id. 325.) There is nothing in the suggestion of the appellant that the pier sought to be condemned is a public pier open to the use of commerce. (*S. R. T. Co. v. Mayor, etc.*, 128 N. Y. 510.) The grant of wharfage from the exterior line of Thirteenth avenue is not an existing but a mere inchoate right dependent upon conditions never performed, and the appellant company is not entitled to wharfage at a bulkhead at any intermediate point. (Gerard on Titles [3d ed.] 117; *Towle v. Remsen*, 70 N. Y. 311; *Mayor, etc.*,

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v. *Law*, 125 id. 380; *Langdon v. Mayor, etc.*, 93 id. 143; *Kingsland v. Mayor, etc.*, 110 id. 569.) The claim of the appellant that the portion of the premises not covered by the pier is open navigable water and open to navigation until the legislature shall change the bulkhead line of 1871, after the plan adopted under said act shall have been carried out and the claim that the respondent might be permitted to fill in the same as land gained out of the Hudson river are conjectural and untenable. (*Kerr v. W. S. R. R. Co.*, 127 N. Y. 269; *In re N. Y. C. & H. R. R. Co.*, 77 id. 248; *In re N. Y. C. Co.*, 104 id. 1, 43; *Langdon v. Mayor, etc.*, 93 id. 157.) In carrying out the plan authorized by the provisions of chapter 574, Laws of 1871, the department of docks is the sole judge of the extent of the lands under water to be acquired, and their judgment is not open to review. (*In re Fowler*, 53 N. Y. 61.) The law under discussion is constitutional. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *Williams v. Mayor, etc.*, 105 id. 420; *Kingsland v. Mayor, etc.*, 110 id. 569; *Bloomfield v. Richardson*, 63 Barb. 437; *Bloodgood v. Mohawk*, 18 Wend. 9; *In re Townsend*, 39 N. Y. 171; *Morris v. Townsend*, 24 Barb. 658; *In re Fowler*, 53 N. Y. 60; *Beekman v. Saratoga*, 3 Paige Ch. 45; *B., etc., R. R. Co. v. Brainard*, 9 N. Y. 100; *U. S. v. Jones*, 109 U. S. 513; *People v. B. & O. R. R. Co.*, 117 N. Y. 155.)

PECKHAM, J. In the above title are comprised three separate and distinct proceedings on the part of the city authorities to acquire title to the lands particularly described in the several petitions.

The land described in the first petition is situated between 34th and 35th streets and belongs to the New York Central and Hudson River Railroad Company, although the legal title thereto is vested in the individuals Cornelius and William K. Vanderbilt. It is used by the company for the purposes of its business.

The fee of the land described in the second petition, and which lies between 35th and 36th streets, belongs to the estate

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of the late Marshall O. Roberts, and the property has been leased by the executors of his will to the New York Central and Hudson River Railroad Company for purposes connected with the business of that corporation.

The land described in the third petition, and lying between 41st and 42d streets, belongs to the Consolidated Gas Company of the city of New York, and is in use by that corporation for its own purposes.

The proceedings to acquire the various interests connected with these lands were inaugurated by the city authorities in the due prosecution of the general plan duly adopted by the proper city officers, pursuant to the various statutes relating to the construction, possession, ownership and maintenance by the city of piers and bulkheads in the North and East rivers.

The application for the appointment of commissioners to appraise the value of the property to be taken was opposed in each instance by those owning or interested in the property. At Special Term the application was in each case granted, and the General Term, upon appeal, affirmed the order appointing the commissioners. An appeal has been taken from each order to this court.

The parties who oppose these proceedings do so upon three principal grounds:

(1.) They maintain that the act which permits the city to appropriate any of the wharfs, piers, etc., to the *sole* use of special kinds of commerce or of steamboats, and also to lease the piers or property, does thereby in effect provide for a private use of such property, and they say that property which is intended for private use cannot be acquired against the will of its owner by the exercise of the power of eminent domain, either by the state itself, or, as in this instance, by its agent or substitute, the city of New York. (2.) They claim that the property, or some part of it, is already devoted to public use by the railroad and the gas companies, and cannot be condemned to any other public use under a general act of the legislature. (3.) They also urge that the statute contemplates

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a real and actual, although ineffectual, attempt to agree upon a price to be paid for the land as a condition precedent to the right of the city to exercise the power of eminent domain, and in each of these proceedings it is contended that no real *bona fide* attempt to agree upon such price was ever in fact made.

The first ground taken by the owners, if tenable, is conclusive against the maintenance of these proceedings. It strikes at the foundation of the whole proceeding, and no step can be taken which will avoid the objection. Private property cannot be taken for private use against the will of its owner, even upon full compensation being made. The objection raises a most important question. If the leasing to a particular steamship line, to the exclusion of all others, certain parts of the water front upon which a bulkhead and a pier have been erected, make the use of the pier a private use, one owner of wharfage rights may refuse to sell, and thus absolutely prevent the building of a pier in that locality by the city, and thus also obstruct to that extent the development of the general plan for docks and piers adopted by the officers of the city under authority of the legislature. The learned counsel for the owners cites many cases to show that the use to which the property is to be applied must be a public use. The question whether or not it be such an use is a judicial one. There is, as I think, unquestionably a distinction between the use which is public and an interest which is public, and where there is simply a public interest, as distinguished from a public use, the right of eminent domain cannot be exercised. The interest may be of a public nature when the use may tend incidentally to benefit the public in some collateral way. In such case the right to take property *in invitum* does not exist.

Speaking in general terms I should say that the public must, under proper police regulations, have the right to resort to the land or property for the use for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom the title to the property would vest

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upon condemnation. Otherwise the use could not be public. Cases might be cited which declare such principles. The case of *In re Eureka Basin, etc.* (96 N. Y. 42), supports this general doctrine. In that case the use to which the company intended to put the land that it desired to acquire was held not to be a public use, and, among others, one reason for so holding was the fact that when acquired no one would have the right to resort to it upon any terms whatever against the arbitrary will of the company. It was also held that the company itself was not proceeding in good faith.

So also in regard to highways. It has been truly said it is not the amount of travel upon a highway which distinguishes it as a public instead of a private road. A private road might have the larger amount. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway. A public highway to which the public had not the right of access would be an impossible creation. And so a public use might generally be defined as the use which each individual might of right demand upon the same general terms and for the same general purposes as any other individual.

These general definitions, however, do not always cover the case. The statement that the land must be intended for such use that all the public may resort to it upon the same terms was correct undoubtedly in those cases in which the rule itself has been thus formulated. It does not, however, accurately describe for instance the public use of the land which has been taken for railroad purposes.

The public has a right of access to the various stations of the company, which right is necessary to enable the public to avail itself of the right of transportation. But it has no legal right to use the bed of the road for any purpose whatever. There is a right to demand crossings of the road under certain circumstances, but there is no general right of the public to use the land of the railroad company. In the case of such a corporation the right is transformed into a right on the part of all the public to demand at any station of the company

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transportation over its road upon the legal terms of compensation for person and property. It is this right on the part of the public which makes the use of the land by the company, upon which to lay its rails and plant its depots and freight houses, a public use.

Other illustrations might be given to show, what is plain enough without them, that property may, under certain circumstances, be devoted to a special and particular public use, and yet the entire public be permitted to use it or have access to it only in a very restricted manner.

These observations bear, I think, upon the act which the defendants assail. If the pier or dock is leased to a lessee, the public necessarily is itself, to the extent of the possession of the lessee, excluded from the possession of it. At the outset it is, however, to be observed that the act of 1871, as set forth in section 716 of the Consolidation Act, does not provide that all the piers and docks when owned by the city shall be leased to the highest bidder at public auction, or at all. The property may not be leased to anyone. It is to rest in the discretion of the corporation whether a lease of any portion shall be effected. It cannot, therefore, be said at present that the property required in these proceedings will ever be leased, and hence it could not be affirmed that the property was to be taken for private use, as such expression is construed by counsel for defendants. And when we come to examine the provisions and effect of the statute under consideration as to exclusive use for special kinds of commerce and the leasing of piers to lessees, we must consider the nature of the property which is to be so used or leased, and the object and purpose of such use must be viewed in connection with the whole of the property of like nature under the control and ownership of the city.

The legislation regarding the water front of the city of New York has been quite frequently of late years under examination in this court.

The legislature conferred upon the city by a series of early statutes general authority to construct wharves, and the system

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adopted was for the city to convey the land under water to individuals, and they were required to fill up such land and construct wharves, and the right to collect wharfage was at the same time conferred upon them. The lands under water were conveyed to the city in fee, by acts of the legislature, and by charters and grants, to enable the city to fill in such lands itself, or to procure others to do it, as the interest of the city, or in other words the demands of commerce might require. (*Langdon v. Mayor, etc.*, 93 N. Y. 129.)

This continued the general policy of the city and the state for a number of years. The state itself owed a duty to its own citizens to provide adequate means for the carrying on of the commerce which was sure to come to the one great seaport within its borders. That duty, as was observed by FINCH, J., in *Williams v. Mayor, etc.* (105 N. Y. 419, 436), it early imposed upon the city and the citizens, by whom it has steadily been performed at great cost. In 1871 the legislature changed entirely the general system by which this duty of building bulkheads, docks and piers had theretofore been performed.¹

Instead of devolving upon private owners the duty of building such structures and giving to private individuals the right to collect wharfage, a general and vast system was provided for by the act of 1871 (Chap. 574). That system involved the adoption of a plan for the building of bulkheads and piers by the city itself along the whole water front washed by the two rivers, and the collection of wharfage by the city as compensation for their use. In the opinion of the legislature the time had come when the duty to furnish facilities for commerce should no longer be performed by the action of private owners, and the right to collect wharfage should no longer reside with them, but should be reposed in the municipality which was to provide for the growing necessities of a commerce that was advancing with almost unheard of rapidity. The steps which were to be taken as provided by the legislation of 1871, have already been alluded to in detail in the cases above cited and in *Kingsland v. Mayor,*

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etc. (110 N. Y. 569), and it is unnecessary to repeat them here.

The adoption of the plan spoken of contemplated the purchase or erection and the possession and ownership by the city of a great number of piers to the exclusion of all private ownership, and built in accordance with such plan and in a manner uniform with an exterior line adopted by the city as and for a bulkhead line. In 1871 the transportation of persons and property from and to foreign ports by steamships had even then grown to such dimensions in the city of New York that it became practically impossible to transact the commercial business of the port unless these steamships had permanent piers at which they could load and unload their cargoes, and their numbers had become so great that not only were permanent piers a necessity, but the exclusive and entire possession of such piers had also become so necessary that it was impossible to think of doing the business which was to be transacted unless such exclusive use were in some way provided. To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state and through it by the municipality which governs and controls the port. The only standard by which to judge of the extent of the duty consists in the necessities of the business. If a permanent pier and an exclusive right to its use be a necessity of those large steamship lines, without which business cannot be properly transacted, and in the absence of which the steamers will be sent across the river to New Jersey or to some other port, then the duty rests with the state or municipality to furnish such quarters for a fair compensation or else the state is bound to permit the steamship companies to obtain such accommodations from private owners. Having undertaken the duty imposed upon it by the state to provide such accommodations as the interests of commerce fairly require, all appropriate acts by the city done in the performance of that duty are for a public purpose.

Land which is thus taken is taken for a public use, although

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some portion of all the land actually used may be thereafter in the discretion of the city, divided off and placed in the exclusive possession of a lessee for the sole purpose of using it in the transaction of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers.

If the necessity for exclusive use exist, such necessity ought to be recognized by the city and the attempt to supply such necessity is an attempt to fulfill a public duty. The fact of exclusive use by the lessee must be considered with reference to all the other property of a like nature possessed by the city and at which all necessary and proper facilities may be afforded for the remainder of the commerce of the port. If an act should be passed which provided for the ownership by the city of all the piers and docks in the port already erected or thereafter to be built, and also directed the leasing thereof by the city to one steamship company so that there would result a total exclusion of all other steamers or ships, it seems to me that the city could acquire no land *in invitum* for the purpose of owning or building piers or docks to be thus let. It would then indeed be the case of an attempt to take private property for private purposes. Such an act would not be a regulation, but in effect it would be a wanton attempt at the destruction of our commercial interests and power. There would in that event be no fulfillment of a public duty, but on the contrary the perpetration of a crime against the public and the interests of our own citizens.

Neither the state nor the city as its agent would be justified, to say the least, in such an arbitrary abuse of its obligations to the civilized and commercial world.

Extreme cases may always be imagined, although they should have but little if any legitimate weight in an argument. The act under consideration is not of such a character. The authority to lease or to give the exclusive use of some piers for specified kinds of commerce bears no relation in fact to the kind of legislation just spoken of. The circumstances surrounding the case must be viewed in all aspects. The act

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plainly contemplates through all its provisions the fact that there will always remain under the direct control and possession of the city sufficient piers and docks for the accommodation of all commerce which may seek our port and which has no special pier or dock leased to the owner of the vessel desiring dock facilities.

Considering the large extent of the property of this description owned and to be owned by the city, together with the fact that there is no absolute direction to the city to lease the smallest portion thereof to any one, we become at once convinced that the leasing which will be actually carried on under this mere permission will amount to no more than a special regulation of the manner in which a comparatively small portion of the whole property of this nature owned by the city shall be used for the legitimate ends of commerce.

This mere permission to use property by leasing it to others, when the whole surrounding circumstances are examined, cannot be regarded as providing for its private use.

When used by lessees under the facts already stated, the use is a public one. The use is public while the property is thus leased, because it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public; obligations which could not otherwise be properly or effectually performed. And in filling the necessity for such accommodations, the city or the state is only performing its public duty.

For these reasons, we are of the opinion that the first objection taken to the granting of the order for the appointment of commissioners is not tenable.

The defendants' second ground of objection is, I think, equally fallacious.

It is claimed that this property has already been devoted to, and is actually occupied, for a public use, and that it is not within the legislative intent, as evidenced by the general statutes upon the subject, that any land thus used should be condemned for dock or pier purposes.

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The general rule contended for by the defendant, that property devoted to one public use will not be regarded as subject to the right of condemnation for another public use, unless the statute plainly grants such right, may be admitted to the full extent thus stated. It is not necessary that the statute should in terms so enact. A necessary implication arising from language used is quite sufficient in this as in other cases for the purpose of an enactment. There is, however, in this statute a clear grant in terms of the power to condemn *all* wharf property in New York city to which the city has no right or title, and also any rights, terms, easements and privileges pertaining to any wharf property in the city and not owned by the city. (§ 715, New York Consolidation Act.)

We think this is a sufficient grant of power to include in condemnation proceedings property of the nature described in the statute, even when owned by a railroad or a gas company, and used by the company for landing freight or other property. The property to be taken need not be necessary for the purpose of building a pier or dock according to the plan adopted by the city officers. The act goes much farther than that, and includes the power to take property of this nature belonging to private individuals, so that the whole wharf property may belong to the city. In building piers, wharves, docks, etc., under and pursuant to the plan adopted by the commissioners of docks, the actual building is to be carried on pursuant to the conditions imposed by section 714 of the Consolidation Act, without interfering with the rights or property of any other person, excepting as therein stated. Further power is then given by section 715 of the same act, by which private ownership of all property of this nature may be extinguished and converted into ownership by the city. It is not, therefore, necessary to show that the land proposed to be taken is required in order to carry out the building of any particular pier, or dock, or bulkhead, under the plan already spoken of. It may be required in order to enable the city to carry out its general plan, and to extinguish the title of private parties to certain wharfage property, and to acquire the same for the

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city, and if so, the statute permits the acquisition for that purpose.

It was said in *Kingsland v. Mayor, etc. (supra)*, that the wharves of private owners were to be purchased under the provisions of this act, or taken in the ordinary manner by proceedings under the right of eminent domain. It is plain that the act contemplated the purchase or condemnation of this kind of property, without reference to the question of the particular owners of the same, whether they were private individuals or corporations. The purpose was to place the ownership of all property of this nature in the city itself, to which the whole power of regulation and government was to be given. We agree with what was said upon this subject by the learned presiding justice who delivered the opinion of the General Term in the case of the Consolidated Gas Co., the order in which proceeding is among those herein under review.

As to the third ground of objection, which sets up that there has been no real attempt at an agreement upon the price, and that, therefore, there is no inability to agree set forth, we can add nothing to what has already been said in the Supreme Court upon that subject, and for the reasons therein expressed, we conclude the objection to be unfounded.

The orders should, therefore, in all the proceedings be affirmed, with costs.

All concur.

Orders affirmed.

Statement of case.

CHARLES E. BURNS, Respondent, v. THE DELAWARE, LACK-
AWANNA AND WESTERN RAILROAD COMPANY, Appellant.

Under the provision of the Code of Civil Procedure (§ 8284), providing that where in certain actions the complaint sets forth separately two or more causes of action upon which issues are joined, and each party "recovers on one or more of the issues," each is entitled to costs, the fact that defendant has defeated one or more of the causes of action does not alone entitle him to costs; there must be a recovery in his favor, *i. e.*, an affirmative finding, verdict or judgment in his favor which will have the effect of disposing of the cause of action as to which plaintiff has failed.

Where, therefore, a complaint set forth separately three distinct causes of action, which were put in issue, and on the trial the plaintiff was nonsuited as to two of them, but had a verdict as to the other, *held*, that defendant was not entitled to costs.

N. U. M. Co. v. Murlow (115 N. Y. 170), distinguished.

Among the items of plaintiff's costs taxed was one of \$30 for attending the taking of depositions of three witnesses in another state, two of the witnesses were examined for plaintiff and one for defendant, their testimony related to one of the causes of action, as to which the plaintiff was nonsuited. *Held*, that under the provision of the Code (§ 825) entitling a party to \$10 "for taking the deposition of a witness," plaintiff was entitled to that sum; that a commission having been issued, the statutory allowance followed the right to costs, and neither the taxing officer nor the court could institute an inquiry as to the necessity therefor, and the allowance did not depend upon success as to the particular cause to which the proof was directed, but only upon such success in the action as carried with it a right to general costs; but *held*, that only one fee of \$10 could be charged, not that sum for every witness examined.

Where a party to an action succeeds to the extent that he is entitled to general costs and disbursements, every legal disbursement incurred in good faith in the case follows and cannot be defeated by showing that it was incurred in an unsuccessful attempt to establish a separate cause of action as to which the party fails.

Another item taxed was \$34.50 for commissioners' fees in taking the depositions; there was no proof before the Special Term or the clerk that the commissioners' fees were paid or any obligation to pay them incurred, or that the item was in any way a necessary or proper disbursement. *Held*, that the item was improperly taxed.

Reported below, 68 Hun, 19.

(Argued June 7, 1892; decided October 4, 1892.)

• Opinion of the Court, per O'BRIEN, J.

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made at the October term, 1891, which affirmed an order of Special Term denying a motion by defendant for retaxation of plaintiff's costs and also denying an application to tax costs in defendant's favor.

The facts, so far as material, are stated in the opinion.

Chas. J. Bissell for appellant. Plaintiff was not entitled to tax the two items, thirty dollars taking testimony of three witnesses in Pittsburg, and fourteen dollars and fifty cents commissioner's fees in Pittsburg, and that the defendant was entitled to a full bill of costs under the provisions of section 3234 of the Code of Civil Procedure. (*Blashfield v. Blashfield*, 41 Hun, 249; *Crosley v. Cobb*, 42 id. 166; *Ackerman v. DeLude*, 36 id. 44; *N. U. M. Co. v. Muzlow*, 51 id. 453; *Kilburn v. Low*, 37 id. 237; Code Civ. Pro. § 3232.)

E. A. Nash for respondent. To entitle a defendant to costs, under section 3234 of the Code, there must be a recovery in the action by the defendant upon one or more of the issues. (2 R. S. 617, § 26; *Cooper v. Jolly*, 30 Hun, 224; 96 N. Y. 667; *Crosley v. Cobb*, 42 Hun, 166; *Heath v. Forbes*, 18 Civ. Pro. Rep. 207; *Reed v. Batten*, 22 Abb. [N. C.] 69; *McCarthy v. Lewis*, 61 Hun, 354.)

O'BRIEN, J. The order appealed from adjudged that the plaintiff was entitled to recover costs in the action, and that the defendant was not. The complaint contains three separate and distinct causes of action, each arising out of the neglect of the defendant to perform its duty as a common carrier. It is alleged that the plaintiff, on three different occasions, delivered property to the defendant within this state to transport to different consignees in three different states, and that by reason of its neglect and failure to transport and carry such property to its place of destination within a reasonable time, the property was damaged and the plaintiff sustained loss in consequence. The defendant's answer put in issue all the material allegations of the complaint, as to each cause of action.

It appears that the plaintiff gave no proof whatever in support of the third cause of action, and that at the close of all the evidence, the court granted a nonsuit as to the second cause of action, and submitted the issues upon the first cause of action to the jury, and the plaintiff, on that cause of action alone, had a verdict. Both sides claimed to be entitled to costs. The clerk taxed the bill presented by the plaintiff and rejected that presented by the defendant.

A motion on the part of the defendant for a retaxation was denied at the Special Term, and this order was, upon appeal, affirmed at the General Term. The right of the defendant to costs depends upon the construction to be given to section 3234 of the Code of Civil Procedure, which provides that in certain actions "wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue, in which case the plaintiff only is entitled to costs." The plaintiff must admit that all the conditions mentioned in the statute upon which the right of the defendant to costs depends, exist in this case, except possibly one. The complaint sets forth separately two or more causes of action upon which issues of fact were joined and the plaintiff has recovered upon one of the causes of action. The only question is whether the defendant has also *recovered* upon the other cause of action within the meaning of this section of the Code. The defendant has succeeded in defeating two of the plaintiff's causes of action, but it has been held that something more was intended by the use of the word "recovers." Before the plaintiff is entitled to costs there must, of course, be a recovery in his favor, and this means an affirmative finding, verdict or judgment. The word as used in the section has the same meaning whether applied to a plaintiff or a defendant. This provision of the Code was borrowed from the Revised Statutes (2 R. S. 616), under which it was

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held that in order to entitle a defendant to costs there must be an actual finding or verdict in his favor, and that where there was a general verdict for the plaintiff and no verdict for the defendant, the latter could not be awarded costs, although he had succeeded in defeating the plaintiff upon one or more of the causes of action set forth in the complaint. (*Johnson v. Fellows*, 6 Hill, 353; *Crittenden v. Crittenden*, 1 id. 359; *People v. Feeter*, 12 Wend. 480; *Briggs v. Allen*, 4 Hill, 538.) This was the substance of the decision of the Supreme Court in *Cooper v. Jolly* (30 Hun, 224), when this section of the Code was before it for construction, and this court affirmed the decision in that case without an opinion (96 N. Y. 667). In this case, while there was a nonsuit ordered in favor of the defendant on two of the causes of action stated in the complaint, that is no bar to another action by the plaintiff on the same claims, and hence there has not been a recovery in favor of the defendant within the meaning of this provision of the Code. In such cases, if the defendant intends to claim costs he should ask for an affirmative verdict or finding in his favor that will have the effect of disposing of the cause of action as to which the plaintiff has failed. The case of *Newell Universal Mill Company v. Muslow* (115 N. Y. 170), is in no way opposed to this construction. In that case, although the action was brought to recover several chattels, yet there was but one count or cause of action set forth in the complaint. The fact that the plaintiff succeeded as to some of the property, and the defendant as to the rest, did not bring the case within the section, as the defendant's right to costs is dependent upon a condition that did not exist, namely, the statement by the plaintiff in his complaint of two or more independent and separate causes of action. If the legislature intended to allow a defendant who succeeds in defeating a separate cause of action, stated in the plaintiff's complaint, to recover costs, it would have used some other word to designate the form of the judgment in his favor and upon which the right depended. It is only when he *recovers* upon one or more of

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the separate causes of action that costs follow, and in the absence of an actual verdict, finding or judgment in his favor this condition is not satisfied. Hence the order appealed from was right in so far as it denied costs to the defendant. It is also urged in behalf of the defendant that the clerk included in the costs taxed in favor of the plaintiff two items that were not taxable, namely: "Attending to taking deposition of three witnesses at Pittsburg, \$30;" and "Paid commissioner's fees in Pittsburg, \$14.50." This expense was incurred, as appears from the affidavits, in preparing for the trial of the second cause of action, as to which the plaintiff was nonsuited at the close of all the evidence. The item of \$30 is also included by the defendant in his bill of costs presented to the clerk for taxation, and the affidavit annexed is to the effect that the witnesses examined were necessary. It appears that two of the witnesses were examined for the plaintiff and the other for the defendant, and their testimony related to the issue raised upon the second cause of action or count of the complaint. The commissioner's fees and disbursement, and all disbursements claimed, must be shown to have been necessary in the case in order to warrant the clerk in taxing them. The other item, however, is not a disbursement, but a part of the statutory allowance that follows a recovery and stands upon the same footing as the trial fee, the term fee or the allowance before and after notice of trial. It is provided in section 3251 of the Code that either party shall be entitled, "For taking the deposition of a witness or of a party, as prescribed in section 870, section 871 or section 893 of this act, ten dollars."

"For drawing interrogatories to be annexed to a commission, or to letters rogatory issued as prescribed in sections 888, 912, 913 and 3171 of this act, ten dollars." There are other provisions of the section giving a designated allowance for certain services in an action, as the procuring of an injunction order, an order of arrest or order appointing a guardian for an infant. The only question that can arise upon an application to tax these statutory charges is whether the proceedings were

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had, or the particular service actually rendered in the progress of the litigation. If a commission has been issued in the case or an injunction order, or order appointing a guardian granted and remains a part of the record or the proceedings, the statutory allowance follows the right to costs, and neither the taxing officer nor the court can institute an inquiry as to the necessity of the commission or the particular order, or the value of the service performed. In this case the plaintiff was defeated on the second cause of action, notwithstanding the testimony taken by commission to sustain it, but this very testimony elicited either upon the direct or cross-examination may have been the basis of the nonsuit granted upon the defendant's motion. The right of either party to tax the statutory allowance given by law for examination of witnesses by commission did not depend upon success as to the particular cause of action to which the proof was directed, but only upon such success as carried with it the right to general costs in the action. (Code, § 3228.) As the plaintiff succeeded to that extent the fact that he failed to recover upon the second cause of action is utterly immaterial. It does not appear from the record, under which of the several provisions of the Code above referred to, the witnesses were examined at Pittsburg. Nor does it appear whether the testimony was taken at the instance of the plaintiff or the defendant, or whether it was taken by stipulation or under an order of the court, or a commission. Both parties have included in their bills of costs fees paid the "commissioner." We will, therefore, assume that one commission was issued to examine three witnesses at Pittsburg. The fact that counsel have attended at the taking of the deposition does not entitle the successful party to charge any more than he would be entitled to if the same witnesses had been examined upon interrogatories annexed to the commission, and drawn by counsel. Section 307 of the Code of Procedure authorized a similar charge for similar services, but it was held that under that section only one fee of \$10 could be charged for drawing all the interrogatories to a commission

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for the examination of several witnesses. (*O'Brien v. Commercial Fire Ins. Co.*, 38 Sup. Ct. 4; *Johnson v. Chappel*, 7 Daly, 43.) The plaintiff's costs have been taxed in this case upon the theory that the successful party is entitled to \$10 for every witness examined, whether by written interrogatory or otherwise. This, I think, is not the right construction. The party entitled to costs is entitled to tax \$10 for drawing interrogatories to be annexed to a commission, and the same sum for attending before a referee or commissioner to take a deposition, without regard to the number of witnesses examined. The statutory allowance is limited to \$10 whether one witness or three is examined. The fact that the plaintiff failed to recover on the second cause of action does not, in my opinion, defeat his right to recover the fees of the commissioner for taking testimony in support of it. The legal disbursements of a party in attempting to establish a separate cause of action, in which he fails, are not contingent upon his success as to the particular claim, but upon his right to general costs and disbursements in the action. When a party succeeds to that extent, every legal disbursement incurred in the case will follow, and cannot be defeated by showing that the expense was incurred in an unsuccessful attempt to establish a separate element of the case. A legal disbursement to establish a separate cause of action in which the party fails cannot be held to be unnecessary because of such failure. It is enough if it appears that the party claiming it is entitled to general costs and disbursements in the case, and that it was incurred in good faith in the progress of the cause, and for the purpose of establishing one of the issues presented. When thus incurred it is necessary, though the expense, as in this case, resulted in no benefit to the party, but may in fact have benefited the other side. The defendant in this case would have been entitled to costs as well as the plaintiff had its successful resistance to the second cause of action been expressed in the form of an affirmative verdict in its favor. The plaintiff ought not to be permitted to recover disbursements connected with this cause of action without

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some proof that they were actually incurred. The record does not show that there was any proof before the Special Term or the clerk that the commissioner's fees were paid, or any obligation to pay incurred, or that the item was in any way a necessary or proper disbursement in the case. The charge of \$30 for attending to take depositions should, therefore, be reduced to \$10 and the sum of \$34.50 deducted from the costs as taxed. The order appealed from should be modified in that respect and as thus modified affirmed, without costs to either party.

All concur, except EARL, Ch. J., ANDREWS and MAYNARD, JJ., dissenting.

Ordered accordingly.

JULIUS J. FRANK, Appellant, v. EDWARD A. DAVIS,
Respondent.

Under the provision of the Code of Civil Procedure (§ 1627) authorizing a deficiency judgment in a foreclosure suit for "the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds" it is not essential to such a judgment that the deficiency should be ascertained by a sale in the action; it is sufficient if it be ascertained by a sale in an action to foreclose a prior mortgage to which the party liable was a party.

Where, therefore, after judgment for foreclosure and sale, containing the usual provision for a deficiency judgment, and pending an appeal therefrom the mortgaged premises were sold under a judgment of foreclosure and sale in an action to foreclose a prior mortgage thereon, to which action the parties to the first action were made parties, which sale left a surplus which, upon application of the plaintiff in the first action, was applied upon his judgment, leaving a deficiency, *held*, that he was entitled to a judgment for such deficiency; that for the purposes of his lien the surplus took the place of the mortgaged property, and the application thereof upon his judgment took the place of and was in lieu of a sale.

It seems the legislative purpose in the enactments authorizing a deficiency judgment in such an action was to bring the case within the rule, that where a court of equity obtains jurisdiction of an action it may retain it and give full relief both legal and equitable, so far as it relates to the same transaction or subject-matter.

Frank v. Davis (61 Hun, 496), reversed.

(Argued June 8, 1892; decided October 4, 1892.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 14, 1891, which affirmed an order of Special Term granting an application by plaintiff for leave to enter a deficiency judgment.

This action was brought to foreclose a mortgage and the ordinary judgment of foreclosure and sale was given, containing the usual provision for a deficiency judgment and execution thereon. The defendant appealed from the judgment to the General Term and to this court, and the judgment was here affirmed. (127 N. Y. 673.) During the pendency of the appeals proceedings on the judgment were stayed. After the appeal had been taken to this court an action was commenced to foreclose a prior mortgage upon the same premises, to which the parties to this action were made defendants, and that action resulted in a foreclosure judgment, and the premises were sold under that judgment while the appeal in this action was pending in this court, and a surplus was produced after satisfying the prior mortgage. In a proceeding for the distribution of such surplus upon the application of this plaintiff, about the sum of \$4,000 was applied upon his judgment, and there was still left unpaid thereon upwards of \$3,000. Thereafter upon his motion the order appealed from was made at Special Term directing the clerk to enter and docket a judgment in his favor for the amount of such deficiency, and granting him execution therefor.

Julius J. Frank for appellant. The order applied for was properly granted. The court had not only the power, but it was its duty, to make the order. (Code Civ. Pro. §§ 1626, 1628, 1629, 1630; 2 R. S. 191, §§ 152-156; *Clark v. Simmons*, 55 Hun, 177; *E. L. Ins. Society v. Stevens*, 63 N. Y. 341; *Suydam v. Bartle*, 9 Paige, 294; *Scofield v. Doscher*, 72 N. Y. 491.) A court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue. (*Lynch v. R. R. Co.*, 129 N. Y. 274; *Matthews v.*

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Duryee, 4 Keyes, 525; *Dunning v. O. N. Bank*, 61 N. Y. 497.)

Benjamin A. Cardozo for respondent. The remedy of the plaintiff is by an action at law upon the bond. He cannot obtain a deficiency judgment until there has been a sale of the premises under his own, and not under a prior mortgage. (*Frank v. Davis*, 61 Hun, 496; *Loeb v. Willis*, 22 id. 508; *Cobb v. Thornton*, 8 How. Pr. 66; *Basche v. Doscher*, 9 J. & S. 150; *Bank of Rochester v. Emerson*, 10 Paige, 359; *Hunt v. Dohrs*, 39 Cal. 304; *M. L. Ins. Co. v. Hopper*, 42 Atl. Rep. 528; 2 Jones on Mort. §§ 1709, 1711; *Duntley v. Van Buren*, 3 Johns. Ch. 330; *Sprague v. Jones*, 9 Paige Ch. 397; *Burroughs v. Tostevan*, 79 N. Y. 567, 572; *Orchard v. Hughes*, 1 Wall. 73; *Noonan v. Lee*, 2 Black, 499, 501; Code Civ. Pro. §§ 1626, 1627; *People v. Bacon*, 99 N. Y. 275.) The order of the General Term was discretionary, and is, therefore, not appealable to this court. It lies in the court's discretion in doubtful cases not to make the decree over for the deficiency, but to leave the defendant to sue for the same. (*Withers v. Morrell*, 3 Edw. Ch. 560; *N. A. F. Ins. Co. v. Handy*, 2 Sandf. Ch. 492; *In re Schell*, 128 N. Y. 67; *F., etc., Co. v. B., etc., Co.*, 109 id. 342.)

EARL, Ch. J. The judge at Special Term granted plaintiff's motion upon the authority of the case of *Stewert v. Hamel* (33 Hun, 44). The General Term disapproved of the decision in that case, and held that the jurisdiction of an equity court to enter a deficiency judgment in an action to foreclose a mortgage is strictly statutory, and that such a judgment can be entered only after a sale under the foreclosure judgment and a deficiency thus resulting and ascertained.

In England, and in this state prior to the Revised Statutes, the Court of Chancery, in an action to foreclose a mortgage, was not supposed to have jurisdiction to render a personal judgment against the mortgagor upon his bond or covenant to pay the mortgage debt, and such a judgment could only be

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obtained by an action at law. (*Noonan v. Lee*, 2 Black, 499, 501; *Orchard v. Hughes*, 1 Wall. 73; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Jones v. Conde*, 6 id. 77; *Globe Ins. Co. v. Lansing*, 5 Cow. 380; *Sprague v. Jones*, 9 Paige, 252; *Equitable Life Ins. Socy. v. Stevens*, 63 N. Y. 341, 344; *Burroughs v. Tostevan*, 75 N. Y. 567, 572.) This was an exception to the general rule, that where a court of equity obtains jurisdiction of an action it will retain it and administer full relief, both legal and equitable, so far as it pertains to the same transaction or the same subject-matter. (*Lynch v. Elevated Railroad Co.*, 129 N. Y. 274; *McGean v. The Same*, recently decided in this court.*) The purpose of this rule was to relieve parties from the expense and vexation of two suits, one equitable and the other legal, where the whole controversy could be adjusted in the one suit. There was no reason, so far as we can perceive, for taking the case of a mortgage foreclosure out of this convenient and beneficent rule; and the lawmakers of this state took early occasion to change the law by providing that a personal judgment for a deficiency may be given in the foreclosure action against any party liable for the mortgage debt. (2 R. S. 191, §§ 151, 154.) They went further than the equitable rule, and authorized a personal judgment, not only against the mortgagor, as to whom equitable relief could be had, but also against any other person who was obligated for the payment of the same debt.

It was early held that a contingent decree for the payment of the deficiency could be made before the sale under the foreclosure judgment. (*McCarthy v. Graham*, 8 Paige, 480.)

The position taken by the defendant (in which the court below sustained him) is extremely technical. It was provided in the Revised Statutes that a personal judgment against the mortgagor might be ordered "for the balance of the mortgage debt that may remain unsatisfied after a sale of the premises;" and the Code is substantially the same. (§ 1627.) His claim is that as there has been and could be no sale upon the judgment in this action, the deficiency could not be ascertained in

* 133 N. Y. 9.

Opinion of the Court, per EARL, Ch. J.

the mode mentioned in the statute, and that, therefore, a deficiency judgment is unauthorized, and that the plaintiff must bring an action at law to obtain such a judgment.

The purpose of the provisions contained in the Revised Statutes and re-enacted in the Code was to change the chancery rule as it had before been understood, and to bring the practice in foreclosure actions within the general chancery rule above referred to, and even, as we have seen, to extend that rule. The deficiency was to be ascertained by a sale of the mortgage premises, and not by the estimates of witnesses or other less satisfactory evidence. We are asked to hold that enough of the old chancery rule is left to prevent a deficiency judgment, unless the deficiency be ascertained by a sale in the action in which the judgment is asked. We think we are justified in holding that that rule has been entirely swept away and that the general rule in equity practice above referred to, except as it is modified by the provisions of the Code, governs foreclosure as other equitable actions. Where there is a sale under the foreclosure judgment, and after the application of the proceeds there is a balance unpaid upon the mortgage, the deficiency is thus ascertained. But the full purpose of the statute has been accomplished if the deficiency be ascertained, as in this case, by a sale in an action to foreclose a prior mortgage to which the defendant was a party.

The surplus arising from the sale under the prior mortgage is as to this plaintiff, for the purposes of the lien of his mortgage, to be treated as real estate. (*Moses v. Murgatroyd*, 1 John. Ch. 119; *Dunning v. Ocean National Bank*, 61 N. Y. 497.) The surplus money took the place of the real estate and the plaintiff's lien was transferred to that. He could not sell it under his judgment, but he had the right to have it applied upon his judgment, and such application took the place of and was in lieu of a sale of the real estate. The deficiency was thus ascertained; and we cannot hold that a court of equity could not, in such a case, give a personal judgment for the deficiency, without going against the prevailing practice under the general rule above referred to, without

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unnecessarily shortening the arm of equity and sacrificing substance to mere form. The plaintiff properly obtained his equitable judgment, and as part of the relief to which he is entitled, to do complete justice between the parties, he should have the deficiency judgment which he asks.

The order of the General Term should be reversed and that of the Special Term affirmed, with costs in this court and the Supreme Court.

All concur.

Ordered accordingly.

In the Matter of the GLOBE MUTUAL BENEFIT ASSOCIATION.

A corporation organized under the act of 1888 (Chap. 175, Laws of 1888), providing for the incorporation of co-operative life and casualty insurance companies, has no power to receive, as members, infants of such tender years that they are unable to exercise any choice in becoming members or to exercise the powers with which members are invested under the act.

It seems that the act simply provides for the voluntary association of persons capable of acting in the administration of the affairs of the corporation and of appointing beneficiaries; as, therefore, the law fixes an arbitrary period when persons become clothed with general legal capacity, only persons of full age may become members.

Reported below, 68 Hun, 268.

(Argued June 8, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 4, 1892, which affirmed an order of Special Term, restraining the Globe Mutual Benefit Association from continuing to transact business so far as the insurance of minors is concerned.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Charles F. Ayling for appellant. A person becoming a member of this association incurs no liability and undertakes the performance of no duty. (*McDonald v. Lewis*, 29 Hun, 87; *Palmer v. P. Ins. Co.*, 84 N. Y. 63; *Elkhart v. Houghton*, 98 Ind. 149.) Where neither statute, by-laws or

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certificate imposes any liability or duty upon persons becoming members of such associations, certificates of membership may be lawfully issued to minors. (*C. M. L. Ins. Co. v. Hunt*, 127 Ill. 257; 1 Parsons on Cont. 332.) The business of insuring the lives of minors against death or accident is not unlawful. (*Grattan v. N. L. Ins. Co.*, 15 Hun, 74; *Mitchell v. Union*, 45 Me. 104; *Loomis v. Engle*, 6 Gray, 396; *Warnock v. Davis*, 104 U. S. 775.) The legislature intended by the act of 1883 to place companies incorporated under that act upon the same footing as other insurance companies. (Laws of 1883, chap. 175, § 1; *State v. M. Ins. Co.*, 72 Mo. 146; Laws of 1885, chap. 175.) The fact that the original incorporators of the appellant are required to be adults does not prevent infants from subsequently becoming members. (Field on Corp. § 69.) The fact that under the statute of 1883 a member of this corporation may designate his beneficiary, does not prevent an infant becoming such member. (Laws of 1883, chap. 175, § 5.)

Simon W. Rosendale, Attorney-General, for respondents. There is no law authorizing an infant to become a member of a co-operative or assessment life insurance company or to enter into a contract of membership or of insurance in such a company: and the attempt, on the part of the appellant, to admit infants to its membership, and to enter into contracts of insurance with them, was an unauthorized and an unlawful exercise of corporate power. (Laws of 1883, chap. 175; Tyler on Infancy, 42; *Bolton v. Bolton*, 73 Me. 299.) The members of a co-operative life and casualty insurance company organized under the act of 1883, are the corporators thereof, and an infant cannot be one of the corporators of a corporation. (*N. & E. R. R. Co. v. Coombe*, 3 Exch. 565.) The business of the appellant, which the order appealed from seeks to enjoin, was unlawful because in contravention of a sound public policy. As practiced by the appellant, it is but a species of gambling or the issuing of wager policies. (*Bliss on Life Ins.* §§ 21-31; *Bacon on Ben. Soc.* §§ 248-252.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The order from which this appeal is taken enjoins the defendant, a co-operative life and casualty insurance association organized under the act, chapter 175 of the Laws of 1883, entitled "An act to provide for the incorporation and regulation of co-operative or assessment life and casualty insurance associations and societies," from transacting the business of infantile insurance. The order proceeds on the ground that the insurance of infants is not within the powers of corporations organized under this statute and is inconsistent with the statutory scheme and the legislative intention.

The by-laws of the defendant provide that any persons between the ages of six months and seventy years, approved by the medical director, may become a member of the society. The applicant, if approved, is entitled to a certificate of membership, and on paying an entrance fee and a certain sum weekly during life, the company undertakes to pay at his death to a beneficiary designated by the member, or to the next of kin if no beneficiary is named, a certain sum called a benefit, provided there is a fund realized from voluntary donations, admission fees and dues collected, or which may be collected from members, out of which such payment can be made.

There are two classes of members, a life class and a casualty class, the distinction between which is for the present purpose of no importance. It appears from a schedule in the case that infants from one to four years of age have been admitted as members of the corporation, in whose name certificates of membership have been issued designating a beneficiary, insuring the infant named in a certain sum in one of the classes mentioned.

The first section of the act of 1883 authorizes any number of persons not less than nine, residents of the state, to associate themselves together to organize a corporation thereunder. The second section prescribes that the associates shall file in the office of the superintendent of the insurance department a declaration of their intention to form a company under

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the act, containing several particulars specified, to be signed and acknowledged by each of the corporators. By the third section upon the completion of the organization, it is declared that "said corporators and those that may thereafter become associated with them or their successors, shall be constituted a body politic and corporate." The fourth section authorizes the making of by-laws. The fifth section declares that corporations organized under the act, issuing certificates payable on the decease of a member or upon his sickness or other physical disability, or to a beneficiary, from resources derived from voluntary donations or admission fees, dues or assessments collected from members, and whose payment is conditional upon means so realized, etc., shall be deemed to be engaged in the business of life or casualty insurance upon the co-operative or assessment plan and "shall be subject only to the provisions of the act." The sixteenth section provides for the holding of an annual meeting of the members or policy holders of the corporation, of which due notice shall be given, and requires that before the adoption of any by-law or amendment thereto, a copy shall be mailed to the members and directors of the corporation, with a notice of the time and place when and where the same will be considered. The eighteenth section authorizes a member to change the beneficiary with the consent of the corporation, and without the consent of the beneficiary.

The defendant was a co-operative association under the act, a continuing membership in which is made dependent on the member keeping up his dues. Each holder of a certificate is by virtue thereof a member and corporator in the association, and so remains until by nonpayment of dues his membership is forfeited. The statute contemplates a meeting of the associates in annual meeting, at which reports of receipts and expenditures are to be submitted, and the associates assembled at a meeting duly notified, are to consider and pass upon by-laws or amendments proposed for adoption.

It is plain that the powers conferred upon members cannot be exercised by children of tender years, such as have been

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permitted to become members of the corporation defendant. The children insured by the defendant, whose ages are given in the schedule, were incapable of exercising any choice in becoming members, or of appointing a beneficiary, or of exercising the powers with which members are invested by the statute. They could take no part in the co-operative scheme upon which the corporation rests, and which implies the voluntary association of persons capable of acting in the administration of the affairs of the corporation. There is nothing in the statute which permits the inference that a child may be made a member of the corporation upon the application of the parent, or that a beneficiary may be designated or changed by any person except the member himself.

It has been held that where a statute authorizes persons to form a corporation, it is implied that they shall be persons of full age. (*Hamilton & Flamborough Road Co. v. Townsend*, 13 Ont. App. R. 534; 16 Am. & Eng. Corp. Cas. 645.) Infants admitted as members by the defendant became members of the corporation, if legally entitled to admission, and may be elected trustees or directors, and it might happen that management of the affairs of the corporation would become vested in persons who could not have organized it.

We place our assent to the judgment below on the ground that it appears from a consideration of the statute of 1883, and the nature and object of co-operative insurance companies, and the relation which members hold to the corporation, that adult persons only were contemplated as entitled to membership. The law fixes an arbitrary period when persons become clothed with general legal capacity, and while in many cases youths under twenty-one are capable of exercising an intelligent judgment and might properly be admitted to the advantage of membership in a company like that of the defendant, in many others they would be wholly unfitted to act as members of such an organization.

We think the order below is right and it should be affirmed. All concur, except O'BRIEN and MAYNARD, JJ., not sitting. Order affirmed.

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125	285
189	519
185	285
150	448

THE PEOPLE ex rel. DUANE S. EVERSON, Respondent, v.
JACOB LORILLARD et al., Appellants.

A constitutional provision, which attempts to regulate the language and forms of expression to be used in legislative enactments, is not to be so construed as to embrace cases not fairly within its general purposes or policy, or the evils it was intended to correct, although they may be within its letter.

A constitutional provision is not to be so construed as to work a public mischief, unless its language is of such explicit and unequivocal import as to leave no other course open to the court, and when its intent is ascertained, that must prevail over its letter.

Where a statute, by its own language, grants some power, confers some right, imposes some duty or creates some obligation, the fact that it refers to some other existing statute, general or local, in order to point out the procedure, or some administrative detail necessary for the accomplishment of the purposes of the act does not bring it in conflict with the provision of the State Constitution (§ 17, art. 3), declaring that: "No act shall be passed which shall provide * * * that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."

Accordingly *held*, that the act of 1890 (Chap. 249, Laws of 1890), providing for the acquisition and improvement of certain lands in connection with Washington bridge, was not rendered obnoxious to said constitutional provision because of the fact that it refers to another local act (Chap. 490, Laws of 1888) as to the method of procedure to be had to acquire title to the lands required.

(Argued June 8, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 1, 1892, which affirmed an order of Special Term directing a peremptory writ of mandamus to issue for the purpose stated in the opinion, wherein the material facts are also stated.

D. J. Dean for appellant. The act, chapter 249, Laws of 1890, violates section 17 of article 3 of the Constitution of this state. (*People ex rel. v. Bank*, 67 N. Y. 572; Laws of 1883, chap. 490; *People v. Squire*, 107 N. Y. 593; *Wells v. City of Buffalo*, 14 Hun, 448.)

H. D. Hotchkiss for respondent. It is plain that there is nothing in the act of 1890 by which the act of 1883, or any part thereof, is made or deemed a part of it, or which enacts that the act of 1883, or any part of it, shall be applicable to the act of 1890. The constitutional restriction does not apply, unless its explicit terms are expressly violated. (*People v. Learned*, 5 Hun, 626, 637; *Wells v. City of Buffalo*, 14 id. 438; *Hathaway v. Tuttle*, 12 W'kly Dig. 240.) References to prior acts, such as are made in the second section of the act of 1890, are not prohibited by the constitutional provision. (*People ex rel. v. Banks*, 67 N. Y. 568; *In re U. F. Co.* 98 id. 139; *People v. Squire*, 107 id. 593; *People v. Hoyt*, 7 Hun, 39.)

O'BRIEN, J. The order in this case which has been brought here for review directed a peremptory writ of mandamus to issue to the corporation counsel of the city of New York, requiring him to take charge of and conduct with all practicable speed any and all proceedings, authorized by law, for the appointment of commissioners of appraisal, to ascertain the compensation to be paid to the owners or persons interested in certain real estate, designated upon a triplicate map made and filed in pursuance of chapter 249 of the Laws of 1890, and to fix the time and place for the first meeting of the commissioners so appointed. The General Term having affirmed the order, the corporation counsel has appealed to this court, and the sole ground of the appeal is that the second section of the act above mentioned is in conflict with section 17 of article 3 of the Constitution of this state which declares that: "No act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act or which shall enact that any existing law or any part thereof, shall be applicable, except by inserting it in such act."

The act, chapter 249 of the Laws of 1890, provided for the acquisition and improvement, by the city of New York, of certain lands in connection with Washington bridge, over

the Harlem river, and the second section or that part of it which requires action to that end to be taken by the authorities of the city of New York, is as follows :

"The said commissioners, on behalf of the mayor, aldermen, and commonalty of the city of New York shall thereupon apply forthwith to the Supreme Court at any Special Term thereof, held in the first judicial district, for the appointment of three disinterested persons, residents of the city of New York, as commissioners of appraisal, to ascertain and appraise the compensation to be made to the owners and all persons interested in the real estate shown on said profile maps, which shall not have been theretofore acquired by the city of New York for the fee of the same. *Such proceeding shall be had upon the said application, except that the same shall be in the first judicial district, as are provided for the acquisition of real estate by chapter 490 of the Laws of 1883, and with the like effect, and all payments for the real estate so acquired and for the charges and expenses of acquiring the same, shall be made in the manner in which such payments are to be made and out of the moneys therefor to be raised, as provided in said last-mentioned act.*" /

Section 3 then provides that the property acquired, with the improvements thereon, "shall be kept and maintained by the department of public parks, as public, parks and highways, and for no other purpose except the Croton aqueduct, and the expenses thereby incurred shall be paid in the manner provided by law for the payment of the other expenses of the said department."

The difficulty suggested with respect to this statute is that while it authorizes the city to acquire lands it does not *in extenso* prescribe the procedure under which they were to be obtained, but for that purpose refers to another statute namely, chapter 490 of the Laws of 1883. The latter act is the one which confers power upon the city of New York to construct a new aqueduct and to acquire lands for that purpose. The provisions conferring the power to construct, the procedure under which the lands were to be acquired and the

manner in which the money was to be raised to pay for them are all set forth in that act.

It is somewhat difficult to give to that provision of the Constitution, invoked in this case to condemn the legislation in question, a reasonable construction that would be applicable in every case. A provision of the fundamental law which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and is at best of very doubtful utility. When the organic law has fixed the limits of legislative power and has placed some general and suitable restraints upon its methods of procedure, its proper office is generally fulfilled, but an attempt to prescribe the language or the forms to be used or observed by the legislature in the enactment of statutes must inevitably result, either in the condemnation of numerous legislative acts, perfectly wholesome and just, or in the liberal exercise by the courts of their undoubted powers to give to all laws a just and rational construction and meaning. A constitutional provision intended to operate as a restraint upon the legislature, with respect to the language and forms of expression to be used in framing acts of legislation, is not to be so construed as to embrace cases not fairly within its general purpose or policy, or the evils which it was intended to correct, though they may be within its letter. Since the incorporation of this section in the Constitution in 1875, hundreds of statutes have been passed that must be held to be in conflict with it if we adopt that construction contended for by the learned counsel who argued in support of this appeal. There are many general acts conferring very important powers or imposing important duties to be exercised or performed according to some provision of the Code or some statute general or local which contains the appropriate procedure for such a case. There are also many local acts applicable to cities and other public corporations authorizing the issue of bonds or the raising of money according to the general provisions of the charter; Still others may be found both general and local con-

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ferring powers upon private corporations to contract debts in the manner provided in some other law. To hold that all these acts are void, as in conflict with this provision of the Constitution would be to disturb titles, promote litigation and inflict widespread injury. The worst evils that the framers of the provision could have had in view would be multiplied a hundred fold by such a construction. A constitutional provision, like a statute, should not be so construed as to work a public mischief, unless the language used is of such explicit and unequivocal import as to leave no other course open to the court, and when the intent of the lawmakers is ascertained that must prevail over the letter of the law. (*Smith v. People*, 47 N. Y. 330; *People ex rel. Jackson v. Potter*, id. 375; *People ex rel. Killeen v. Angle*, 109 id. 564.)

This court, in the case of *People ex rel. Commissioners v. Banks* (67 N. Y. 572) stated the purpose of this constitutional provision in this language: "The evil in view, in adopting this provision of the Constitution, was the incorporating into acts of the legislature, by reference to other statutes, of clauses and provisions of which the legislators might be ignorant, and which affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law which would not receive the sanction of the legislature if fully understood."

Can it be affirmed, with any reason or probability, that the legislature was not, when it passed the act of 1890, familiar with the act of 1883 for the construction of the aqueduct and acquiring lands therefor? Is there any reason to believe that when the legislature enacted that lands in connection with Washington bridge might be acquired and paid for by the city of New York for use as a park in the same way as was specifically provided in the aqueduct act, it was imposed upon by some of the devices against which the constitutional provision was intended to guard? There is nothing on the face of the bill and nothing suggested in the manner of its enactment that would justify such a conclusion. In the *Banks* case (*supra*), this court further said, with reference to the

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proper construction of this provision of the Constitution: "It is not necessary, in order to avoid a conflict with this article of the Constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the Constitution, or the mischief intended to be remedied. By such a reference the general statute is not incorporated into, or made a part of the special statute. The right is given, the duty declared or burden imposed by the special statute, but the enforcement of the right or duty, and the final imposition of the burden are directed to be in the form, and by the procedure given by the other and general laws of the state. Reference is made to such laws, not to effect or qualify the substance of the legislation, but merely for the formal execution of the law."

The learned counsel for the corporation, conceding the propriety of the rule here laid down, insists that it goes no farther than to permit a reference in the enactment of a statute to some other general law, for the purpose of pointing out the proper procedure. It is true that the reference in that case was to a general law, and the language of the court conformed to the nature of the case under consideration. But there is no reason to believe that if the reference in that case had been to a local statute that the decision would have been otherwise, as such a distinction would have no support in reason or authority. This appeal cannot be sustained without holding in effect that every statute, general or local, must contain within itself every detail necessary to its complete execution, and that when the lawmakers desire to adopt the procedure or some other matter of detail contained in a local statute, that cannot be done by a suitable reference, but the same must be cut out of the other statute and actually inserted in the new one *mutatis mutandis*. Such a construction of this section of the fundamental law, besides producing all the mischief already pointed out, would, as was said in *People, etc., v. Squire* (107 N. Y. 602), lead to innumerable repetitions of laws in the statute books, and render them not only

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bulky and cumbersome but confused and unintelligible, almost beyond conception. The framers of this provision could never have intended to introduce into our statute law such elements of confusion and uncertainty. Their purpose was to require bills introduced in the legislature to be presented in such form and their essential provisions expressed in such language that the effect of the proposed enactment might be understood by legislators of reasonable intelligence. To carry out this intention it is not necessary to give to the amendment a literal construction. The general object will be satisfied by giving it an interpretation more reasonable and less stringent than that contended for in support of the appeal. (*Union Ferry Co.* case (98 N. Y. 158).)

When a statute in itself and by its own language grants some power, confers some right, imposes some duty, or creates some burden or obligation, it is not in conflict with this constitutional provision because it refers to some other existing statute, general or local, for the purpose of pointing out the procedure, or some administrative detail, necessary for the execution of the power, the enforcement of the right, the proper performance of the duty, or the discharge of the burden or obligation. In this case the main object of the statute was to confer power upon the city to acquire land for a certain purpose, and that power is expressed in appropriate language, but the procedure, by means of which the lands were to be condemned, and the administrative acts on the part of the city authorities, necessary in order to procure the money for the payment of the awards, are designated by reference to another statute. Granting that the aqueduct law was local, as urged by the counsel for the corporation, still, it was an act of such great public importance that the members of the legislature might be supposed to have been even more familiar with all of its provisions than with many general laws. The statute in question did not provide literally that the aqueduct law should be made or deemed a part of it, nor that any part thereof should be applicable, but that the proceedings for condemning the lands and raising the money to pay for them,

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should be the same, and hence the statute cannot well be held to be repugnant to the letter, and much less to the spirit and object of the constitutional provision. / Whether the city authorities, and especially the corporation counsel, were vested with discretion, with respect to the execution of this statute, in the sense that they could not be compelled to move by mandamus, is a question not argued and which all the parties have evidently intended to waive. The order appealed from should, therefore, be affirmed, with costs.

All concur, except EARL, Ch. J., not voting.

Order affirmed.

In the Matter of the Petition of HUGH M. STANFIELD.

Where the income of an estate or of a designated portion thereof, is given to a legatee for life he becomes entitled to whatever income accrues thereon from and after the death of the testator, unless there is some provision in the will from which a contrary intent can be inferred, and the legatee may require the executor to account to him from that time. To such a case the rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary or of administration, has no application.

The time of payment, however, is not affected and the legatee must wait therefor until the expiration of one year from the granting of letters. Where, therefore, the will of S. directed his executor to invest \$20,000 in a manner specified and pay over the income to his son for life, and at his death the principal to another, and it appeared that the corpus of the estate was so invested at the time of the testator's death as to produce income, *held*, that the son was entitled to the income from the death of the testator although not to its payment until a year from the granting of letters testamentary; that although the executor had a year in which to make the investment directed, as the gift of the income was wholly independent of the gift of the principal, the right to the former did not depend upon the investment, and whatever income arose from the principal until the investment was made, as directed, belonged to the legatee to whom it was expressly given.

Cooke v. Meeker (36 N. Y. 15), explained.

Reported below, 64 Hun, 277.

(Submitted June 8, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 13, 1892,

Opinion of the Court, per MAYNARD, J.

which affirmed an order of the surrogate's court, directing the payment of interest upon a legacy to the petitioner herein from the death of his testator.

The facts, so far as material, are stated in the opinion.

Lowrey, Stone & Auerbach for appellant. General legacies are not payable until one year after the issuance of letters, and interest does not commence to run until the legacy is payable. (2 R. S. 90, § 43; *In re McCowan*, 123 N. Y. 526, 531; *Kerr v. Dougherty*, 17 Hun, 341; *In re Lynch*, 52 How. Pr. 367; *Nahmens v. Copely*, 2 Den. 253; *Garr v. Bennett*, 3 id. 433; *Bradner v. Faulkner*, 12 N. Y. 472; *Welch v. Brown*, 14 Vroom. 37; *Powers v. Powers*, 1 N. Y. Supp. 636; *Barrow v. Barrow*, 8 id. 783; *Pierce v. Chamberlain*, 41 How. Pr. 501.)

William A. Boyd for respondent. The petitioner is entitled to interest on the legacy from the date of the death of the testator, viz., May 28, 1890. (*In re Fish*, 19 Abb. Pr. 209; *Cooke v. Meeker*, 36 N. Y. 15; *Hillyard's Estate*, 5 W. & S. 30; *Barrow v. Barrow*, 8 N. Y. Supp. 783; *Powers v. Powers*, 1 id. 636.)

John Notman for respondent. When a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death. (*Cooke v. Meeker*, 36 N. Y. 15; *In re Lynch*, 52 How. Pr. 367; *Nahmens v. Copely*, 2 Den. 253; *Gibson v. Bott*, 7 Ves. 89; *Bradner v. Faulkner*, 12 N. Y. 472; *Kent v. Dunham*, 106 Mass. 586; *Thorn v. McGowan*, 124 N. Y. 526.)

MAYNARD, J. The respondent is given in the will of his father the income of twenty thousand dollars for life. The estate was inventoried at three hundred thousand dollars. There were bequests of the income of various sums aggregating, with the respondents, eighty-five thousand dollars.

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It is undisputed that after the payment of all just debts, the income-bearing principal of the estate will be largely in excess of this sum. The decedent's property was so invested at the time of his death as to be productive of revenue, and the income received by the temporary administrator and the executor, from May 28, 1890, to February 12, 1892, was over thirty thousand dollars, or at the annual rate of six per cent upon its inventoried value. The executor is directed in the will to invest twenty thousand dollars in bonds and mortgages, or government bonds and pay over the income to the respondent; but this investment has not been made. Upon a proceeding properly instituted the Surrogate's Court made an order directing the executor to pay the respondent the interest on ten thousand dollars at the rate of three per cent annually from the testator's death until the further direction of the court. Both parties appealed to the Supreme Court, where the order was affirmed, without costs, and the executor has brought this appeal, upon which the attorneys for the residuary legatee also file a brief for a reversal of the order.

Where the income of an estate, or of a designated portion, is given to a legatee for life, we think it is clear that he becomes entitled to it whenever it accrues, and if the estate is productive of income from the death of the testator, he can require the executor to account to him for the income from that time. The rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary, or of administration (*Matter of McGowan*, 124 N. Y. 526), has no application in such a case. It is, by its terms, limited to general legacies payable out of the corpus of the decedent's estate. In the present case the bequest is not of a part of the principal of the estate, or of any property possessed by the testator in his lifetime; but of that which is to arise or accrue after his death from a specified fund to be set apart for that purpose. It is the income which constitutes the respondent's legacy. He is not seeking to charge the estate with interest upon his legacy, but is simply endeavoring to secure the legacy itself and his effort,

therefore, involves no infringement of the rule regulating the payment of interest upon general legacies.

It is argued that the bequest of the income to the respondent and of the principal sum, out of which it is to arise, to the residuary legatee, are to be treated as but one legacy payable to different persons; and that as the executor is directed to invest the principal sum in a certain class of securities and pay over the income to the respondent, he has the statutory year in which to make the investment; and that thus the case is brought within the operation of the rule upon which appellant relies. Such a construction cannot be adopted without doing violence to the language of the will. The gift of the income is independent of the gift of the principal; and the right to the income does not depend upon the investment, but was created and exists regardless of it. The direction to the executor, with respect to the investment of the fund, has reference to the administration of the trust, and cannot be available to defeat the legatee's title to income accruing previously to the time when the investment is required to be made. Until it is made an equivalent in value of the property out of which the fund is to be raised must be deemed to stand in place of the investment, and whatever income arises from it meanwhile, belongs to the legatee to whom it has been expressly given. The rule which deprives the legatee of interest upon a general legacy for the period of one year is not founded upon any presumed intent of the testator. It had its origin in the ecclesiastical courts and was, to a certain extent, a rule of convenience. It was also, in part, the outgrowth of the ancient doctrine that the assent of the executor was necessary to complete and perfect the title of the legatee and to authorize him to take possession of his legacy, and the period of one year from the testator's death was fixed upon as a reasonable time in which the executor must determine whether he would take upon himself the execution of the will. At the end of that time he was required, either to renounce the appointment, or be prepared to liquidate the debts and legacies.

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When this rule was adopted, the principal, if not the sole, assets of a decedent's estate were, ordinarily, not interest-bearing or income-producing, and hence there was both justice and propriety in deferring, not only the time of payment of a legacy, but also the right to interest thereon until the personality could be converted into money for its satisfaction. At the present time, the personal estate of a testator is frequently made up of securities or investments bearing interest, or yielding an income, and in such cases there does not seem to be any rational grounds upon which the rule can rest, except for such brief period of time as the money required to pay the legacy is actually lying idle and uninvested in the executor's hands. The executor must account for the increase of the estate from the testator's death, and so it will often happen that such increase will fall into the residuary estate and go to the legatees but remotely entitled to the testator's consideration, to the prejudice of general legatees who had the principal claim upon his favor, and for whom he undoubtedly intended to make immediate provision.

Such would be the practical result in this case if the appellant succeeds in its contention.

The income of twenty thousand dollars, given to the respondent, a son of the testator, would, for a period of nearly fourteen months, be wrested from him and paid to the residuary legatee, a grandson, who is otherwise munificently remembered in the will.

We are asked to cause this to be done, not by virtue of the command of any statute, but because a rule formulated under different conditions than now exist, and founded in part upon a legal fiction, seems to require it. While we recognize the binding force of the rule, we are not disposed to extend the field of its operation to other than general legacies, payable out of the body of the testator's estate. There is no difference in principle between the gift of an annuity and the gift of income, with respect to the time when each begins to accrue, and it is conceded that an annuity is payable from the death of the testator, unless a different time is prescribed in

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the will. It is true that an annuity usually consists of a gross sum payable in any event, while income must depend upon the earnings of the estate, or some part of it, after deducting lawful charges and commissions, and, of course, if not earned cannot be paid. But this is a contingency which affects not the quality of the gift, but its amount and the certainty of payment. If the estate is sufficient for the liquidation of debts and other charges, and is so invested as to be productive of income from the death of the testator, a bequest of income to a legatee for life must be construed to invest him with a title to such income from the date of the testator's demise, unless there is some provision in the will from which a contrary intent is to be inferred. The statutory time of payment of the income to the legatee is not affected by this construction. He must still wait, as the respondent did, until the expiration of one year from the grant of letters before payment of the income can be demanded, but he is then entitled to his share of the net income which has previously accrued.

There are many authorities which support our conclusion in this case. (*Cooke v. Meeker*, 36 N. Y. 15; *Pierce v. Chamberlain*, 41 How. Pr. 501; *Matter of Lynch*, 52 id. 367; *Powers v. Powers*, 16 St. Rep. 770; *Barrow v. Barrow*, 29 id. 240; *Matter of Fish*, 19 Abb. Pr. 209; *Craig v. Craig*, 3 Barb. Ch. 76; *Hilyard's Estate*, 5 Watts & S. 30; *Eyre v. Golding*, 5 Binn. 472.)

We would have been content to have affirmed this order upon the authority of the case of *Cooke v. Meeker* (*supra*), but it has been repeatedly insisted in the Surrogates' Courts that the views of the learned chief justice upon the point here involved were obiter, and, therefore, not authority to sustain the claim of the respondent, and that the decision of the case turned upon the fact that the legatee was a minor, and that the gift of income was intended for her support and maintenance, and that the case was, therefore, brought within a well-known exception to the general rule with reference to the payment of interest upon legacies. We do not so read the opinion. While the plaintiff was a minor, it does not

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appear that the testator stood *in loco parentis* to her, or that there were any words in the will indicating that the bequest was for her support, further than the direction that the income of a specified sum was to be applied to her use during her lifetime. There were other like bequests of income, some of which were to adults, and the court evidently intended to lay down a general rule for the guidance of the executors and trustees, with respect to all such legacies in the will. At page 19 it is said: "The weight of authority, undoubtedly, now is in favor of allowing the payment of annuities or incomes to commence at the testator's death;" and again, at page 22, after reviewing the cases: "The authorities would seem abundant, therefore, to sustain the doctrine that when a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death."

The order must be affirmed, with costs to the respondent, to be paid out of the residuary estate.

All concur.

Ordered accordingly.

135	296
142	387

135	298
160	600

GEORGE C. CARPENTER et al., Respondents, v. THE GERMAN AMERICAN INSURANCE COMPANY, Appellant.

A policy of fire insurance contained a condition that if the assured were not the sole owners of the property insured, or did not have title to the land on which it was situated in fee simple, and this fact was not expressed in the policy, it should be void. The assured held the land under a contract of purchase; this fact was not expressed in the policy, but had been communicated to a clerk of the general agent of the insurer who had been sent to make an examination of the premises preliminary to the risk. In an action upon the policy, *held*, that notice to the sub-agent while so engaged in soliciting the insurance was notice to the company, and bound it to the same extent as though it had been given directly to the agent himself; and so, that the policy was not avoided by the condition.

The policy provided for immediate notice of loss, and that a particular account thereof should be rendered to the company. It appeared that

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notice of the fire was given by plaintiff to the company on the day it occurred. A few days after adjusters examined the premises, and experts were employed to make estimates of the value of the property burned. When this, after considerable delay, was accomplished, an insurance man was employed to prepare formal proofs; he delayed doing so for about a month. The principal plaintiff was called away several times on important business, and was unable to give his personal attention to preparing and forwarding the proofs. They were not received by defendant until 115 days after the fire. After receiving them defendant insisted upon examining, and did examine, said plaintiff under oath upon matters relating to the loss. *Held*, that plaintiff was required to serve the proof of loss within a reasonable time; but under the circumstances it could not be decided as a matter of law that the delay was unreasonable; and that the question was properly submitted to the jury.

Also *held*, that the insistence of defendant upon the right to examine plaintiff after service of proof of loss was a waiver of any objection founded on the delay.

The contract of purchase was with a bank. K., its president, held the title for the benefit of the bank; the conveyance having been made to him because of a statute of Pennsylvania, in which state the premises were situated, forbidding foreign corporations from acquiring and holding real estate in that state. This was forgotten by its officers when the contract was made, and K. advised and consented to the contract. *Held*, that while the bank did not have the legal title it was, the beneficial owner, and, conceding it could not, in view of said statute, have established a trust in its favor enforceable against K., that a suit in equity could have been maintained by plaintiffs on performance of the contract on their part, against the bank and K. to compel a conveyance of the land; and, therefore, that plaintiff had an insurable interest in the property.

(Argued June 9, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1891, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action upon a policy of fire insurance.

The facts, so far as material, are stated in the opinion.

Martin W. Cooke for appellant. The conditions of the policy with respect to the preliminary proofs of loss to be fur-

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nished by the plaintiffs to the defendant were not observed, but were violated by the plaintiffs. (May on Ins. 568, § 465; *Blossom v. L. F. Ins. Co.*, 64 N. Y. 162.) The circumstances under which the plaintiffs were examined after the proofs of loss were furnished, did not deprive the defendant of the objection in respect of proofs of loss. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 410.) It was essential to the verdict rendered that the jury should find that plaintiffs notified defendant of the character of their title, or that defendant had knowledge of the state of the title when it issued the policy, and such finding was against the evidence, or so palpably against the weight of evidence as to leave no doubt as to the conclusion that the jury was influenced by passion or prejudice in respect of the verdict. (*Constant v. University of Rochester*, 111 N. Y. 604; *Slattery v. Schwanecke*, 118 id. 543; *Walton v. A. Ins. Co.*, 116 id. 317; *Weed v. L. & L. F. Ins. Co.*, Id. 106; *Bell v. L. F. Ins. Co.*, 19 Hun, 238, 243, 244; *Bush v. W. F. I. Co.*, 63 N. Y. 531; *Van Allen v. F. F. S. I. Co.*, 64 id. 469.) Assuming that the statement to Mandeville or to Andrews, or to both, was made to the company, the plaintiff is not relieved from the forfeiture of the policy under its terms. (*Garfield v. Hatmaker*, 15 N. Y. 475; *Webb v. Rice*, 6 Hill, 219; *Everett v. Everett*, 48 N. Y. 218; *Sweeney v. F. Ins. Co.*, 20 Penn. St. 337.) It was error to charge that if plaintiffs made the representations as to title, which they claim they did make, they were entitled to recover. (*Rohrback v. G. Ins. Co.*, 62 N. Y. 47; *Alexander v. G. F. Ins. Co.*, 66 id. 464; *Pierce v. E. S. Ins. Co.*, 62 Barb. 636; *Mead v. N. W. Ins. Co.*, 7 N. Y. 530; *Wilson v. H. M. Ins. Co.*, 6 id. 53; *French v. C. M. Ins. Co.*, 7 Hill, 122; *Jennings v. C. M. Ins. Co.*, 2 Den. 75; 5 id. 326; *Wall v. Howard*, 14 Barb. 383; 56 N. Y. 565.)

George Wadsworth for respondent. The plaintiffs had an insurable interest. (1 Phillips on Ins. 110, § 180; *Shotwell v. J. Ins. Co.*, 5 Bosw. 247; *Æ. Ins. Co. v. Tyler*, 16 Wend. 296; *Griffey v. N. Y. C. Ins. Co.*, 110 N. Y. 417;

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Bicknell v. L. & C. F. I. Co., 58 id. 677; *S. Ins. Co. v. Lewis*, 42 Ga. 587; *New York v. B. Ins. Co.*, 41 Barb. 231; *Riggs v. C. M. Ins. Co.*, 125 N. Y. 7; *E. R. R. Co. v. R. Ins. Co.*, 98 Mass. 420; *Redfield v. H. P. I. Co.*, 56 N. Y. 354; *S. F. & M. Co. v. Allen*, 43 id. 389, 396; *Herkimer v. Rice*, 27 id. 163, 175, 177; 1 Wood on Fire Ins., 645, § 281; *Coursin v. P. Ins. Co.*, 46 Penn. St. 323; *C. Ins. Co. v. Lawrence*, 2 Pet. 25; *Smith v. B. Ins. Co.*, 6 Cush. 448; *Milligan v. E. Ins. Co.*, 16 U. C. [Q. B.] 314; *Lerow v. Wilmarth*, 9 Allen, 382.) The statutes of Pennsylvania, concerning the holding of lands in that state by a foreign corporation, create no defense to this action. *Beatty v. Benton*, 73 Ga. 187; *Phillips v. Moore*, 100 U. S. 211; *Cross v. De Valle*, 1 Cliff. 282; *Goundie v. N. Y. & C. R. R. Co.*, 132 Penn. St. 610.) The demand by defendant that plaintiffs should submit to an examination under oath, pursuant to the requirements of the policy, was a recognition of the validity of the policy, and a waiver of all grounds of forfeiture of which it then had knowledge. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 410, 419; *Roby v. A. C. Ins. Co.*, 120 id. 501; *Brink v. H. F. I. Co.*, 80 id. 108; *Storm v. P. F. Ins. Co.*, 40 N. Y. S. R. 40; *Beales v. W. F. Ins. Co.*, 75 N. Y. 7.) Notice to Mandeville, the agent, of the manner in which the property was held was enough. (*Bidwell v. N. W. Ins. Co.*, 24 N. Y. 302, 304; *Rowley v. E. Ins. Co.*, 3 Keyes, 557; *McCulloch v. Norwood*, 58 N. Y. 562; *Haight v. C. Ins. Co.*, 92 id. 51; *Whitted v. G. F. I. Co.*, 76 id. 415; *Van Schaick v. N. F. I. Co.*, 68 id. 434; *Sprague v. H. P. Ins. Co.*, 69 id. 128; *Baldwin v. C. Ins. Co.*, 60 Hun, 389.)

ANDREWS, J. It must be assumed in disposing of this appeal that Andrews, the subagent of Mandeville, before the original policy was issued of which the policy upon which this action is brought is a renewal, was sent by Mandeville to inspect the premises and arrange the insurance, and that he was then informed by the plaintiff that the property upon which the

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insured building was erected was held under a contract of purchase from the State Bank of Elizabeth, New Jersey. If this constituted notice to the defendant, then, within our decisions, the policy was not avoided by the printed condition that if the assured is not the "sole, absolute and unconditional owner of the property insured, or if said property be a building and the insured be not the owner of the land on which said building stands, by title in fee simple, and this fact is not expressed in the written portion of the policy, this policy shall be void." (*Van Schoick v. Niagara Frie Ins. Co.*; 68 N. Y. 434.) It appears that Mandeville was a general agent of the defendant, clothed with power to make contracts of insurance and to issue policies, and was furnished with printed forms which he filled up as occasion required. He was agent for several other companies also, which presumably upon the evidence was known to the defendant. Andrews had been employed by him for several years before the policy in question was issued, to solicit insurance, acting as Mandeville's clerk and employe. It has been the common custom and practice of agents of insurance companies, having the power of general agents, to employ subordinates to render services similar to those rendered by Andrews, and we have held that notice to such a subagent while engaged in soliciting insurance of any fact material to the risk, and which affects the contract of insurance, is notice to the company and binds the company to the same extent as though it had been given directly to the agent himself. (*Arff v. Star Ins. Co.*, 125 N. Y. 57; *Bodine v. Exchange Ins. Co.*, 51 id. 117.) The point, therefore, based on the condition as to the ownership of the insured property must be overruled.

Another question relates to the delay in serving proofs of loss. The fire occurred October 10, 1883. The proofs of loss were not received by the company until February 2, 1884, 115 days after the fire. The policy provides that in case of loss "the assured shall give immediate notice thereof and shall render to the company a particular account of said loss under oath," embracing certain facts specified. Under this clause it

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became the duty of the plaintiff to furnish proofs of loss within a reasonable time. What is such reasonable time may become a question of law, as where there has been a long delay, unexcused, and the company has not waived a compliance with the requirement of the policy. But in cases where circumstances are shown which reasonably justify the delay, or the insured acted with reasonable promptness in view of all the facts disclosed, having regard both to his own situation and the protection of the company, it may be a question for the jury whether the provision as to proofs has been violated. So also, it is competent for the company either before or after the alleged delay to waive an insistence upon this clause and such waiver may be express or it may be implied from conduct, inconsistent with any intention to rely upon this defense. In this case it appears that notice of the fire was given by the plaintiffs to the company on the same day on which it occurred. Adjusters of companies represented by Mandeville came to the premises a few days afterwards and examined into the circumstances. The plaintiffs, according to their evidence, proceeded to procure a millwright and another expert to make estimates of the value of the machinery and property burned or injured. When this had been accomplished after considerable delay, the matter of preparing the formal proofs was put in charge of an insurance man who delayed the preparation for about a month. The principal plaintiff, after the fire and before the proofs were forwarded, was called to Philadelphia several times on important business connected with the delivery of cattle under contracts made by him before the fire, and was unable to give personal attention to the preparation and forwarding of the proofs. Under the circumstances it could not be ruled as a question of law that the delay in furnishing the proofs was unreasonable. The performance of the stipulation as to proofs of loss is not made a condition of liability of the defendant by the terms of the policy, but it is a condition of recovery. The furnishing of proofs of loss promptly may in many cases be important to the protection of the rights of the insurer against fraud, and

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the company may insist upon prompt action by the assured. But when, as in this case, the matter was left open, under the obligations expressed in the policy without more, we cannot under the circumstances disclosed say as matter of law that the delay was unreasonable. We think also the insistence of the company upon the right to examine the plaintiffs under oath upon matters relating to the loss, made in the letter of February 20, 1884, and their subsequent examination by the defendant, was a waiver of any objection founded on the delay in serving proofs of loss. It is claimed that the demand contained in the letter was conditioned upon the assent of the plaintiffs that such examination should not be construed as a waiver by the company of the objection. The letter is at least equivocal. The plaintiffs could not safely refuse to submit to an examination, and the letter does not state that the company would dispense with examination in case the plaintiffs did not acquiesce in the condition. The points as to the proofs of loss and the exception of the defendant based thereon, are not we think tenable.

The remaining question relates to the claim that the plaintiff at the time of the insurance and of the fire, had no insurable interest in the building which was in part the subject of the insurance. It is doubtless true that the State Bank of Elizabeth, the vendor in the contract of sale to the plaintiffs, had no legal title to the property embraced therein. It was, however, the beneficial owner. The bank owned the mortgage and bid off the property on the foreclosure in 1877, but its agent at the sale, under advice of its attorney, directed the conveyance to be made to Mr. Kean, the president of the bank, because of the statute of Pennsylvania which prohibited any foreign corporation from acquiring and holding any real estate within the commonwealth "directly in the corporate name or by or through any trustee or other devise whatever, unless specially authorized to hold such property by the laws of the Commonwealth." (Purdon's Dig. § 56, p. 292.) Mr. Kean paid nothing for the property and acknowledged that it belonged to the bank, and never made any claim to it

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whatever. He knew of the negotiation between the bank and Carpenter for the sale and purchase of the property and advised and consented to the contract by the bank, and was fully acquainted with the fact that Carpenter was paying the purchase money of the land, in reliance upon the ownership of the property by the bank. The bank, Carpenter and Kean acted in good faith, supposing that the bank held the legal title to the land. The officers of the bank had forgotten that the title had been taken in Kean's name and for this reason the contract with Carpenter was made in the name of the corporation.

We deem it unnecessary to go into the abstruse questions which have been argued at the bar, as to the legal and equitable right to the land, as between the bank and Kean, growing out of the conveyance to the latter of the legal title on the foreclosure sale. Assuming (but without deciding) that the bank could not, in view of the Pennsylvania statute, have established a trust in its favor, enforceable against Kean, or compelled him to convey the legal title to the corporation, yet it is we think very plain that as between Carpenter on the one side, and the bank and Kean on the other, Carpenter on the performance of his contract could have maintained a suit in equity to compel the bank and Kean to convey the land. Kean would be bound by the plainest principles of equity and justice to make the contract good, which was entered into with his advice and upon which Carpenter had advanced his money. It would be no answer that Kean did not act *male fide*, but supposed that the legal title was in the bank. He stood by and encouraged the sale and knew of the payment of the purchase money by Carpenter in reliance upon the right of the bank to sell the property. (*Storrs v. Barker*, 6 Jo. Ch. 166; *Continental Bank v. National Bank of Commonwealth*, 50 N. Y. 576; *Thompson v. Simpson*, 128 id. 270.) His mistake prejudiced no real right or equity in the land. He asserted none therein and now acknowledges that the bank is entitled to the benefit of the policy. The principle of equitable estoppel applies with persuasive force against Kean,

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preventing him from asserting as against Carpenter any right in the land and a court of equity would require him to convey so that the just expectations of Carpenter should not be disappointed. Carpenter had therefore, an insurable interest in the property.

The questions decided dispose of all the material points in the appeal.

The result is that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

JACOB MARK, Appellant, v. ELIZABETH A. L. HYATT et al,
Respondents.

An action of trespass will not lie to recover the damages caused by an injunction, where the court had jurisdiction and power to grant such a writ, and where the one issued was not wholly void, but was erroneous because not restricted in its operation, and was set aside for that reason; unless the procurement thereof is alleged and proved to have been malicious and without probable cause.

It seems, where a void injunction order is granted, the mere service thereof is not a trespass, and if the party sought to be restrained voluntarily obeys it, he cannot maintain an action of trespass to recover his damages.

Defendant, E., brought an action against the firm of which plaintiff was a member for an accounting and for royalties due her under a contract on its part to manufacture, as her licensee, a patented article, and for a cancellation of the license because of nonperformance of the contract, and to enjoin the licensees from further manufacturing under the license. By the judgment an accounting and revocation of the license was ordered and an injunction granted which perpetually restrained the licensees from manufacturing the patented article. A copy of this judgment was served on the licensees May 1, 1888. They obeyed the injunction, but appealed from the judgment, and on June fifth obtained an order staying proceedings. The judgment was modified on appeal by striking out the portion awarding an injunction. (17 J. & S. 375.) In an action of trespass plaintiff sought to recover his damages because of ceasing to manufacture during the interval between the service of copy judgment and the obtaining of the stay. The complaint was dismissed. *Held*, no error; that no trespass was established.

Reported below, 61 Hun, 325.

(Argued June 9, 1892; decided October 4, 1892.)

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APPEAL from judgment of the General Term of the Supreme Court of the first judicial department, entered upon an order made October 21, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Circuit.

This was an action for a trespass.

The facts, so far as material, are stated in the opinion.

Edward D. McCarthy for appellant. The Superior Court had no jurisdiction to grant an injunction against Mark, the defendant therein. It is beyond the power of any local court to grant an injunction in any cause brought in the right of a patentee. (*H. S. Co. v. Reinold*, 102 N. Y. 167; *C. S. Co. v. Clark*, 100 id. 370; *Dudley v. Mahew*, 3 id. 14, 16, 18.) He who obtains an order from a court of general jurisdiction and procures the same to be served on his opponent in order to take advantage to himself, is estopped to say that this order ought to be disobeyed. (High on Inj., § 1652; Bigelow on Est., 363; *Robertson v. Smith*, 28 N. E. Rep. 857; *Walton v. Develing*, 61 Ill. 201; *Daniels v. Tearney*, 102 U. S. 415; *C. Co. v. H. Co.*, 39 Barb. 16; *Adams v. Olive*, 57 Ala. 249; *Hanna v. Mackenzie*, 5 B. Mon. 314; *Carver v. Carver*, 77 Ind. 498; *Hoy v. Rogers*, 4 T. B. Mon. 225.) A void order of a court which contains a command, impliedly sanctioned by a threat, is a trespass *ab initio*; persons who obtain the order and those who execute it, are jointly and severally liable. (*Langbein v. Fisher*, 103 N. Y. 89; *Keeler v. F. Bank*, 6 N. Y. Supp. 470; *Carew v. Rutherford*, 106 Mass. 1; *Carey v. Pringle*, 11 Johns. 444.)

Henry H. Man for respondent. Either the Superior Court had jurisdiction or it had not. In either case there was no cause of action by Mark, one of the defendants in the Superior Court, against Mrs. Hyatt. (*Day v. Bach*, 87 N. Y. 56; *People ex rel. v. Edson*, 20 J. & S. 53; *Dickey v. Head*, 78 Ill. 261, 273; *State v. Voorhis*, 37 La. Ann. 605; *Jenkins v. Parkhill*, 25 Ind. 473, 477.) Malicious prosecution is the

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only remedy for unjustly setting a court in motion. This action cannot be maintained as one for malicious prosecution. (Add. on Torts, 219; *Marks v. Townsend*, 97 N. Y. 590; *Day v. Bach*, 14 J. & S. 460; 87 N. Y. 56; *Lawton v. Green*, 64 id. 326, 330, 331; *Palmer v. Foley*, 71 id. 106, 108; *Cox v. Taylor*, 10 B. Mon. 17; *Beaty v. Perkins*, 6 Wend. 382; *Hallock v. Dorning*, 69 N. Y. 238; *C. L. S. Co. v. Butchers' Union*, 120 U. S. 141.) The Superior Court had not jurisdiction of the cause of action. (*Hyatt v. Ingalls* 124 N. Y. 93, 103; *In re Ingalls*, 139 U. S. 548; *D. T. Co. v. Hyatt*, 125 id. 46; *Hyatt v. D. T. Co.*, 106 N. Y. 651.) The judgment of injunction did no practical injustice to Ingalls and Mark. (*Hyatt v. Ingalls*, 124 N. Y. 95; *Gage v. Herring*, 107 id. 640.)

FINCH, J. The injury alleged in this action, and for which compensation is sought, originated in the operation and effect of a previous judgment obtained by Elizabeth Hyatt, one of the present defendants. In that action she sued the firm of Mark & Ingalls under a contract to manufacture as her licensees a patented article. Her complaint set out the terms of that agreement which showed a license granted by her for the term of her patents and of any reissues thereof; the licensees binding themselves to pay a specific royalty and to render due and correct accounts of their manufacture. The validity of the patents and the consequent right of their owner were thus recognized, and the licensees, while the agreement stood, could not call in question the title of the patentee. Her complaint further alleged that an account had been refused and payment of the royalties withheld; that the licensees were wholly irresponsible, and asked as relief an accounting and recovery of the royalties due; that the license granted should be delivered up to be canceled, and the licensees be enjoined from further manufacture under the agreement. Of this action the court had full and undoubted jurisdiction, and all the relief asked was clearly within its authority. The plaintiff sought no decree beyond its admitted power to grant.

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An answer was served denying most of the material averments of the complaint, and upon the issues joined the case was heard at Special Term. The court rendered an interlocutory judgment in favor of the plaintiff which ordered an accounting before a referee, directed a cancellation and revocation of the license, and awarded an injunction which exceeded the relief demanded, in that it restrained the licensees perpetually from manufacturing the patented article without, in express terms, merely forbidding it under the license. That judgment was erroneous in part, but not void for want of jurisdiction to hear and determine the action. That existed both as to the parties and the subject-matter. There was power to grant an injunction, but the power was erroneously exercised in not explicitly limiting its operation. That error is claimed to have been in excess of the jurisdiction, outside of and beyond it, and so the injunction was wholly void. But it was not so treated. A copy of it was served upon the licensees, and they, with full liberty to disregard it, elected not to do so, but to obey it and deem it valid until reversed. The copy was served upon them on the 1st day of May, 1883. They were not bound to take the risk of disobedience, but, while free to do so, were at liberty to proceed against it by appeal. They chose that remedy. They appealed from the judgment, and on the fifth of June obtained an order staying the effect and operation of the judgment and leaving them free pending the appeal from the restraint of the injunction. They might probably have obtained that order earlier, and so have protected themselves from all substantial loss, but from May first to June fifth they claim to have submitted to the injunction, to have discontinued their manufacture, and to have suffered thereby damages, to recover which the present action of trespass was brought. The judgment in the former action was modified by striking out the portion awarding an injunction. The complaint herein was dismissed on the trial, and the General Term have affirmed the dismissal.

It seems to me that the plaintiff founds his argument upon

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two inconsistent theories and constructs it by shifting unconsciously from one to the other as the emergency requires. The judgment against him in the prior suit, so far as it awarded an injunction, was either utterly void for excess of jurisdiction or was merely an erroneous exercise of jurisdiction. It could not be both, for the two things are totally inconsistent, and the truth of the one inevitably involves the falsity of the other. The learned counsel for the appellants argues first that he had a right to treat the injunction as operative, as valid until reversed, and so, as merely erroneous and not wholly void; the consequence following that the damages occasioned were the product of the process, caused by its compulsion, and not by the needless and voluntary act of the party enjoined; that the then plaintiff is bound by that construction, and may not, after having obtained and served the injunction, defend against its consequences by asserting it to have been granted without jurisdiction. To all that I agree and concede that the authorities cited fully justify the contention. The plaintiff here may hold his adversary to that theory, but in that event must also stand upon it himself, for it cannot be at the same time both utterly void and good until reversed. The result of that reasoning is that while there may have been damages there was no trespass. The patentee lawfully and fairly submitted her rights to the decision of the court. While the judgment rendered was in one respect erroneous, neither the party nor the court were, therefore, trespassers. Some injury or inconvenience quite often flows from the operation of an erroneous judgment pending the appeal, which ends in a reversal, but there is no trespass and no trespasser. To some extent the evil is prevented by provisions which stay the execution of the judgment and authorize a summary restitution; but no action of trespass will lie to recover the damages unless the prosecution is alleged and proved to have been malicious and without probable cause. We have held that doctrine quite firmly and clearly in cases of injunctions, declaring in substance that, although the restraining order ought not to have been granted and was set aside for that reason, yet the damages incurred,

where the proceedings have been regular, cannot be recovered in the absence of an undertaking, except upon the basis of a malicious prosecution. (*Lawton v. Green*, 64 N. Y. 326; *Palmer v. Foley*, 71 id. 106.) Nothing in this case warrants any such action, and it necessarily follows that, upon the theory which plaintiff adopted, and on which his claim for damages rests, and to which he resolutely holds his adversary, there was no cause of action established, and the courts below properly dismissed the complaint.

But here the appellant suddenly shifts his ground and claims that the judgment instead of being merely erroneous and valid until reversed was never valid at all so far as the injunction was concerned, but void utterly at the moment of its rendition. If that be true the damages claimed resulted not from the void process, but from the voluntary and needless act of the appellant in view of its existence. No action was taken under it by the then plaintiff. Neither the person nor the property of the appellant was touched or seized. When a void warrant of arrest or order of attachment is issued the granting of the process is not necessarily a trespass, and none may exist until it is in some manner executed. It is the arrest or the levy which constitutes the trespass and not the mere granting of the process. The injunction, if absolutely void, was a nullity; it could not and did not restrain the manufacture. If the appellant ceased work the act was his own, and both voluntary and needless. It originated in no compulsion, for there was nothing to compel and nobody compelling. But he answers that the mere service of a copy of the judgment was a trespass, because the then plaintiff could not be heard to say that the injunction which she caused to be served was void and ineffective. But on the theory now under consideration it is not the defendant who asserts the void character of the process, but the plaintiff himself, driven to it by the necessity of providing some sort of foundation on which to build up a claim of trespass, and he cannot assert it for his purpose and deny it when it serves hers.

But, as already intimated, I do not think the injunction

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was absolutely void. Jurisdiction in the action was full and complete. This court so held upon the appeal. There was authority to grant an injunction, but the remedy was declared to be needless and so improper in view of the revocation of the license by the judgment rendered. (*Hyatt v. Ingalls*, 124 N. Y. 93.) Regarded as restraining a future infringement, the injunction would have been in excess of the jurisdiction; but in view of the pleadings, of the findings, and of the general relief awarded, it may and should be construed as a perpetual restraint upon a manufacture under the contract, and was erroneous simply because open to possible misconstruction, and needless and superfluous when construed as it should be as not transcending the jurisdiction. And this view of it, as a decree voidable and not void, and valid until reversed, is the view upon which plaintiff acted, by force of which only he can assert damages suffered by compulsion, and which he ought not to be permitted to allege for one purpose and at the same time deny for another.

We find no error in the record, and the judgment should be affirmed with costs.

All concur, except GRAY, J., not voting.

Judgment affirmed.

HENRY A. MOTT et al., Respondents, v. JACOB OPPENHEIMER et al., Appellants.

Where a covenant concerns land and is one which is capable of being annexed to the estate, and it appears by the instrument that such was the intention of the parties, it is to be construed as running with and charging the land.

Where a court in equity obtains jurisdiction for the purpose of an injunction and is in full possession of the merits it may, although the relief asked cannot properly be granted, retain the suit in order to do complete justice between the parties and administer such other equitable relief as the merits of the case justify.

P. and A., who were owners of adjacent lots, made an agreement in writing providing that either party, his heirs or assigns, might erect a party wall, one-half on each lot, the other party, his heirs or assigns to

135	312
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have the right to use the same by paying to the party erecting said wall at the time the same shall be so used, one-half the value thereof, and the same shall forever remain as a party wall. It was stated in the agreement that it shall be construed "as covenants running with the land." The agreement was signed and acknowledged by A. only, and was recorded. P.'s grantee built upon his lot a house with a party wall, and plaintiffs subsequently acquired title to the premises through various conveyances, each of which was made subject to the party-wall agreement, S. became the owner of A.'s lot and commenced to build thereon, making use of the party wall; while building S. conveyed to defendants, making no reference to said agreement. In an action to restrain defendants from using said wall until payment to plaintiffs of one-half the value thereof, and for such further relief as might seem proper, the judgment directed payment to plaintiffs of the value of one-half the wall; charged defendants' premises with such payment, and directed that unless made they be sold to satisfy the judgment. *Held*, no error; that while the relief demanded was an injunction, with all the facts before it, it was proper for the court to administer further equitable relief and give to the agreement such legal effect as would accomplish exact justice between the parties; that whether the agreement was to be considered a common law obligation personally enforceable, or an instrument which impressed a lien upon the land, when it was availed of it was enforceable against the land.

Also *held*, the objection that the agreement appeared to have been executed by but one of the parties and, so, was invalid as lacking mutuality, was not tenable, as the proofs showed that the contract had been made and defendants, standing upon A.'s title, were not entitled to make the objection.

Also *held*, the objection that because the conveyance to defendants from S. contained no reference to the agreement they were not bound, was untenable, as the agreement was a charge upon the land, and if defendants did not have actual, they had constructive notice from the public records and so were bound.

Also *held*, that the agreement was, by reason of the expressed intention of the parties, a covenant running with the land, and its effect was to grant or to create an interest in the premises.

Cole v. Hughes (54 N. Y. 444); *Scott v. McMillan* (76 id. 144); distinguished.

(Argued June 10, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 26, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

Statement of case.

The nature of the action and the material facts are stated in the opinion.

George Fulder for appellant. The plaintiffs were not entitled to an injunction restraining the defendants from using the wall erected upon defendants' premises. (*Bulcom v. Julian*, 22 How. Pr. 349; *Vincent v. King*, 13 id. 235; High on Inj. § 739; *Hobbe v. R. I. M. Co.*, 66 Barb. 592; *Krone v. K. Co. E. R. R. Co.*, 50 Hun, 431; *Estee v. Wilcox*, 67 N. Y. 264; *Adee v. Bigler*, 81 id. 349; *Kerr v. Dildine*, 6 N. Y. S. R. 163, 167; *Brocks v. Reilly*, 18 id. 179; *Savage v. Allen*, 54 N. Y. 458; *McHenry v. Jewett*, 90 id. 58; *Mayer v. Philips*, 97 id. 485; *Mulry v. Norton*, 100 id. 424.) The issues tried were not raised by the pleadings. (*Brantingham v. Brantingham*, 12 N. J. Eq. 160; *Bailey v. Rider*, 10 N. Y. 363; *Mudge v. Salisbury*, 110 id. 413; *Monk v. Harper*, 3 Edw. 109.) The covenants contained in the party-wall agreement are not covenants running with the land. (4 Kent's Comm. [7th ed.] 526; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Bedell v. Kennedy*, 38 Hun, 510; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 id. 141.) The plaintiffs are not entitled to the relief granted, although the covenant should be determined to be a covenant running with the land. (*Cole v. Hughes*, 24 N. Y. 444, 449; *Scott v. McMillan*, 76 id. 144; *Hart v. Lyon*, 12 Wkly. Dig. 258; *Hart v. Lyon*, 15 id. 462; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74; *Vrooman v. Turner*, 69 id. 280.)

Clifford A. Hand for respondent. The absence of Pinkney's signature to the party-wall agreement (or to the duplicate in plaintiff's possession) can in nowise affect the validity of the agreement as against Arkenburgh, by whom it was signed, nor as against the defendants, whose title is derived from Arkenburgh. (*Clason v. Bailey*, 14 Johns. 484; *Davis v. Shields*, 26 Wend. 362; *Worrall v. Munn*, 5 N. Y. 245; *Palmer v. Scott*, 1 R. & M. 394; *Justice v. Lang*, 42 N. Y.

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493.) If any lack of mutuality could be imputed to the agreement in the first instance, it ceased to be important when there was performance by the party who built the wall contemplated by the agreement. (*Miller v. McKenzie*, 95 N. Y. 475; *Todd v. Weber*, Id. 192; *Wyckoff v. De Graff*, 98 id. 138; *W. A. Co. v. Barlow*, 63 id. 62; *L'Ameraux v. Gould*, 7 id. 349.) The remedy granted by the decree was within the power of a court of equity, and the case peculiarly called for exercise of the power. (*Guentzer v. Juch*, 51 Hun, 397; *C. College v. Lynch*, 70 N. Y. 440; *Curtis v. Ayrault*, 47 id. 73; *Henderson v. N. Y. C. R. R. Co.*, 78 id. 423; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 123; *Sharp v. Chatham*, 88 Mo. 498.) The covenants run with the land. (*Hendricks v. Stark*, 37 N. Y. 106; *Griswold v. Sawyer*, 125 id. 411; *Hart v. Lyon*, 90 id. 123; *Dexter v. Beard*, 130 id. 549; *King v. Wright*, 29 N. E. Rep. 644.) But it is by no means necessary that this covenant be held to run with the land, to sustain the recovery below. (*Hodge v. Sloan*, 107 N. Y. 244.)

GRAY, J. In 1876, an agreement was entered into between Pinkney and Arkenburgh, who were owners of adjacent lots of land upon 59th street, in the city of New York, whereby it was provided that either party, his heirs and assigns, might erect a certain description of party wall, the center line of which should coincide with the dividing line of their lots. That agreement contained this clause, that "The other party, his heirs or assigns, shall have the right to use said wall or walls or extensions by paying therefor at the time the same shall so be used one-half of the then value of the part or portion of said wall or extension so used to the party who may have erected said wall or walls, extension or extensions, his heirs or assigns, and that the same shall forever remain as party walls." And the final provision was that this agreement "shall be construed as covenants running with the land."

The agreement in plaintiffs' possession, which was offered upon the trial, bore only the signature of Arkenburgh and his acknowledgment in 1876. It was recorded in 1877. Pink-

ney's grantee built upon the land a house, with the party wall as contemplated by the agreement, and the plaintiffs subsequently acquired the premises so improved. Through various mesne conveyances, each of which, with an unimportant exception, was made subject to the party-wall agreement, Arkenburgh's lot came into the ownership of one Stein, who began to build upon the land and made use of the party wall. While in the course of building, Stein conveyed to the defendant, Jacob Oppenheimer, but made no reference in the deed to the party-wall agreement. Thereafter, and during a few months, conveyances of the same property were made to and fro between Oppenheimer and his grantor, Stein; the reason for which is not apparent from this record.

This action was brought in equity to restrain defendants from using the party wall, except after paying to the plaintiffs one-half its value "and for such other and further relief" as to the court should seem just in the premises. The court found that the plaintiffs were entitled to be paid the value of one-half of the wall and that the defendants' premises were charged with the payment, and it was decreed that unless the payment was made within a fixed time, the premises should be sold to satisfy the obligation to plaintiffs.

The judgment recovered by the plaintiffs was affirmed at the General Term and the defendants appealed to this court.

The appellants advance several grounds in support of their appeal from the judgment. They argue that it was not competent for the court to grant this relief, inasmuch as the issue tendered by the pleadings was the plaintiffs' right to an injunction. I think, however, that with all the facts before the court upon a demand for its equitable intervention, it had jurisdiction to administer such equitable remedies as the merits of the case justified.

It was a most familiar principle of chancery procedure that where the court in equity obtained jurisdiction for the purpose of injunction and was in full possession of the merits, it would retain the suit in order to do complete justice between the parties, and that principle seems quite applicable here.

It became clear that relief by way of injunction was not proper to be granted with such an agreement as the basis for any intervention by the court; but it was equally clear that if the agreement was valid and constituted a charge upon the defendants' premises, its obligation might be enforced in equity in this particular way. Either the agreement was a common-law obligation, personally enforceable by ordinary action; or it was an instrument which impressed with a lien the lands affected. In either case, the right to use the wall was absolutely granted and the obligation to pay the value of the one-half upon the premises adjacent to those of the builder of the wall, when it was availed of, if not personally assumed by the adjacent property owner, was enforceable against his land.

It could not be error, and it was not inequitable, for the court to give to the agreement a proper and legal effect, and one which would accomplish exact justice between the parties.

This ground of appeal, therefore, need not embarrass us in upholding the judgment below.

Then I think the objection that the agreement appears to have been executed by but one of the parties to it, and, therefore, is invalid, as lacking mutuality, is without force.

The instrument which the plaintiffs produced on the trial in support of their case, though reciting its making by both parties and their desire to authorize either to erect a party wall, was signed by Arkenburgh, the defendants' predecessor in the title. We may suppose that the agreement was interchangeably executed and delivered; but, whether the supposition be warranted or not, the proof of a contract between Arkenburgh and Pinkney did not fail. The question is whether the plaintiffs had proved their case by making out an agreement between their and the defendants' predecessors in interest for the erection of a wall, partly on the land of each, and not whether for the plaintiffs' inability to show an actual execution by their predecessor of the instrument evidencing the agreement, they should be precluded from any recovery.

I think the proofs supply any such alleged defect in the case. The wall called for by the agreement was erected by

plaintiffs' predecessor in title and there was thus a performance, which only the executed contract could have authorized. It was acquiesced in and in the chain of defendants' title the conveyances were made subject to the agreement. There was, therefore, in the existence of such facts, a sufficient proof of the execution of this agreement. I do not think it lies in the defendants' mouths, as the parties sought to be charged with this agreement and standing upon Arkenburgh's title, to make the objection.

Another objection is that the defendants are not bound by this agreement, inasmuch as there was no reference to it in the conveyance to them. I think the objection is utterly without merits.

Their grantor, Stein, took subject to the agreement and commenced to erect a house, using the wall for the purpose. The respective rights and obligations of the parties became fixed then. If the agreement constituted a charge upon the defendants' lands, I think it quite immaterial whether the conveyance of the title to them expressed their subjection to the agreement or not. The fact could not be changed and the plaintiffs could not be deprived of any rights, which they may have derived through such an agreement, by an omission in the deed to the adjacent owner, and of this agreement the defendants had constructive notice from its public record, if they did not have actual notice. The defendants took the land and the building in the course of erection upon it by Stein, subject to a lien for the payment of half the value of the party wall.

But, and this seems the more important question in the case, the appellants insist that the covenants in the party-wall agreement were not covenants which ran with the land; for the reasons that no interest in the land was granted and that there was no privity of estate between Pinkney and Arkenburgh.

If this agreement was the ordinary one between adjoining land owners for the erection and use of a party wall on their lands, such as it was in the cases of *Cole v. Hughes* (54 N. Y.

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444) and *Scott v. McMillan* (76 id. 144), I think we should have to agree with the appellants' argument. But this agreement is dissimilar, in the respect that it was expressly agreed that the covenants of the agreement should run with the land. In *Cole v. Hughes*, upon the authority of which *Scott v. McMillan* was decided, it was held of the agreement there that it created a mere privity of contract and not of estate, and did not impose a burden upon the land, merely because the agreement had relation to land. Both of the cases referred to were actions at law for the recovery of the value of one-half the wall, and they failed, for the reason that the grantees of premises, whose former owner had covenanted for himself, his heirs and assigns, were not liable upon the covenant. We do not interfere, in the least degree, with the well settled doctrine of these cases, if we give to the present contract a construction which imposed the burden of its covenants upon the land it concerned.

The question whether a contract having relation to lands is personal, or whether it constitutes a charge upon the lands, obviously, must be determined by a consideration of the expressed intentions of the parties and of the existence of any interest in the land raised by force of its covenants. Words of grant are not essential to create the interest, and a covenant may be construed as a grant. Such a construction has been given where the covenant related to a right of way over land. (*Holms v. Sellar*, 3 Lev. 305.)

In *Hart v. Lyon* (90 N. Y. 663) the contract for the party wall was held unenforceable against a purchaser at a sale in foreclosure, for being merely a personal obligation; but the covenant that the expense of repairing, or rebuilding, the party wall should be borne equally by the parties, "their respective heirs and assigns," was regarded as a covenant running with the land. The court so held in that case, because, as they say, "it is evident that it was the plain import of the instrument that the portion which bound the heirs and assigns should be construed as perpetual and as running with the land." Without any other reference to or discussion of the

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many cases which bear upon the subject of the nature of the obligation of a contract, in its connection with land, I think we may rest upon the rule that where the covenant concerns land, and is one which is capable of being annexed to the estate, and it appears that it is the intention of the parties as expressed in the instrument, then it shall be construed as running with and charging the land thereafter.

In the present case such an intention is evident from the express provisions of the agreement, and I think the effect of the contract clearly was to grant, or to create, an interest in the premises described. I see no ground for sustaining this appeal, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

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WILLIAM COLLINS, Appellant, v. J. BARTLETT HYDORN et al.,
Respondents.

A former judgment concludes a party only in the character in which he was sued, and so, a judgment for or against an executor, administrator, assignee or trustee, as such, presumptively does not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved.

In an action brought by C., a judgment creditor, to set aside certain transfers of real estate made by the debtor and others as fraudulent and void as against creditors, it appeared that one W., also a judgment creditor, had previously brought an action for the same purpose, against the same defendants, pending which he made an assignment for the benefit of his creditors to C., who was substituted as plaintiff therein in his representative capacity. The court in such action having found the transfer to have been made in good faith and valid, judgment was directed and entered in favor of the defendants. The complaint in the former action and in this contained the same allegation as to fraud, and the answers in both were general denials. *Held*, that the former judgment was not a bar or conclusive, by way of estoppel, against plaintiff on the question of fraud.

Also *held*, that the former judgment was not a judgment *in rem*, and so, the rule making such a judgment conclusive against all the world did not apply.

Collins v. Hydorn (62 Hun, 286), reversed.

(Argued June 10, 1892; decided October 4, 1892.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 28, 1891, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury, and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

G. B. Wellington for appellant. The reversal must be deemed to be upon questions of law only. (Code Civ. Pro. § 1338; *Dorchester v. Dorchester*, 121 N. Y. 156.) The order is appealable to this court. (*Raynor v. Raynor*, 94 N. Y. 251; *Dorchester v. Dorchester*, 121 id. 160.) The alleged former adjudication between William Collins, as assignee, etc., and the defendants, is not available to the defendants upon this appeal. (*E. C. F. Co. v. Hersee*, 103 N. Y. 25; *Davis v. Leopold*, 87 id. 620.) The decision against William Collins as assignee of George M. Wiswall for the benefit of creditors, is not *res judicata* against William Collins individually. (*W. Bank v. Farthing*, 101 N. Y. 348; *Rathbone v. Hooney*, 58 id. 467; *Jackson v. Mills*, 13 Johns. 463; *Sinclair v. Jackson*, 8 Cow. 565; *Jackson v. Hoffman*, 9 id. 271; *Jennings v. Jones*, 2 Redf. 95; *Elliott v. Frakes*, 71 Ind. 412; Bigelow on Est. [5th ed.] 130, 131; *Gukie v. K. C. Co.*, 16 Otto, 379; *Van Scott v. Prentice*, 104 N. Y. 57.)

Charles E. Patterson for respondent. The judgment against William Collins, assignee, in the action brought by George M. Wiswall against the defendants in this action, is *res judicata* upon all questions involved in this action, and is conclusive against the plaintiff's right to recover herein. (*Marston v. Swett*, 66 N. Y. 206; Code Civ. Pro. § 1909; *Landon v. Townsend*, 112 N. Y. 93; *Jay v. De Groot*, 2 Hun, 205; *Pray v. Ingraham*, 33 id. 358; *Cundee v. Lord*, 21 N. Y. 269; *Wallace v. Eaton*, 5 How. 99; *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190; *Lawrence v. Bank of the Republic*, 35 id. 320; *Miller v. Hall*, 70 id. 250; *Carpenter*

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v. *Osborne*, 102 id. 552; *Freeman* on Judg. § 606; *Gelston* v. *Hoyt*, 1 Johns. Ch. 543.) Even if it should be held that the General Term based its decision upon an erroneous ground, the judgment of the General Term should be affirmed. (*Ward* v. *Craig*, 87 N. Y. 550; *Sterns* v. *Gage*, 79 id. 102; *Parker* v. *Connor*, 93 id. 118, 128; *Farley* v. *Carpenter*, 27 Hun, 359, 362; *Shultz* v. *Hoagland*, 85 N. Y. 469.)

O'BRIEN, J. The plaintiff, as a judgment creditor of one Elisha W. Hydorn, brought this action against the judgment debtor and his son and son's wife, with others, for the purpose of setting aside certain conveyances and transfers of real estate, made on the 27th day of July, 1885, and a few months before the recovery of the judgment by the father to the son, and through the son to his wife, the defendant Hattie W. Hydorn, on the ground that the conveyances were made for the purpose and with the intent of hindering, delaying and defrauding creditors. The facts and circumstances connected with the transfers which the plaintiff claimed constituted evidence of fraud are quite complicated, and a particular statement of them is not necessary to the determination of the question presented by this appeal. It is enough to say that the court at Special Term after a trial found that the conveyances were made by the grantor therein with the fraudulent intent alleged, when insolvent, and that the defendants, who bring this appeal, participated in the fraud, and judgment was entered declaring the several conveyances and transfers void as to creditors. The General Term reversed the judgment and granted a new trial, and as there is no statement in the order of reversal that it was upon the facts it must be deemed to have been upon some question of law. It appears from the opinion that but a single question was considered, and the judgment of reversal was ordered upon that ground. This question is the principal one discussed at the bar upon the argument of this appeal, and involves the legal effect of a former judgment, not pleaded by the defendants in bar, but claimed to be conclusive evidence for them

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on the question of fraud. (*Marston v. Sweet*, 66 N. Y. 206, 211.) The findings with respect to this judgment, as well as the requests to find, are very imperfect, and it will, therefore, be more favorable for the defendants to take the facts in regard to it from the opinion of the General Term. The only parties that appealed to that court were the defendants J. Bartlett Hydorn and his wife, the son and the daughter-in-law of the judgment debtor. This action was commenced in January, 1887. About the same time one Wiswall, another judgment creditor, brought an action against the same defendants for the same purpose, and upon the same allegations as are disclosed by the complaint in this case. The answer tendered the same issue, namely, a denial of all fraud, and an allegation that the same conveyances as are attacked in this case were made in good faith and without any fraudulent intent. Pending the action the plaintiff Wiswall made an assignment for the benefit of his creditors to William Collins, the plaintiff in this action, who was substituted as plaintiff in his representative capacity in the place of his assignor, the original party. The cause was brought to trial, and in March, 1890, the court rendered a decision in favor of the defendants. The court found as matter of fact that the conveyances were made upon a good consideration and without fraud, and received by the grantees therein without any fraudulent intent or knowledge of any such intent on the part of the grantor and upon a good consideration, and the Special Term directed the dismissal of the complaint.

Upon these findings judgment for the defendants and for costs was entered. On appeal the judgment was affirmed at the General Term and subsequently in the second division of this court. There is no doubt that the question decided in that case is identical with the one presented by the pleadings in this, and decided at Special Term the other way, and if the parties are, in law, the same, the General Term was unquestionably right, and this appeal cannot be sustained. But the plaintiff was a party to the former suit in his representative capacity, as trustee for creditors, while in this he prosecutes in

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his own right. In the former suit he represented and acted for the creditors of Wiswall. In this he is seeking, as an individual, to enforce collection of a debt of his own. When the plaintiff became the statutory assignee of Wiswell he found the suit pending and could have continued its prosecution in the name of the original plaintiff, without making any change in the record. Would it be held then, after the same result, that the judgment would operate as a bar to this suit, or as evidence, simply because, in the discharge of his duty as a trustee for others, he stood behind the litigation; and if not how is the result changed by the fact that he became on his own motion, or on that of the defendants, a party to the record, in his representative capacity. A party may be bound by a former judgment on the principle of representation though not a party by name. (*Ashton v. City of Rochester*, 133 N. Y. 187.)

But the mere fact that the same persons are litigants in the two actions is not always sufficient to satisfy the rule of *res adjudicata*. The same person may in law be considered another person, and consequently another party, by suing in another capacity. (Wells on Res Adjudicata, p. 16, § 21.)

It was held by this court in *Rathbone v. Hooney* (58 N. Y. 467), that a judgment against a party, sued as an individual, is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is in contemplation of law a distinct person and a stranger to the prior proceeding and judgment. This proposition is sustained by the authorities there cited. Substantially the same point was decided in a more recent case where it was held that a bankrupt's equity of redemption in land, was not barred by a judgment of foreclosure of a mortgage, to which it was subject, though his assignee was a party to it in his individual, but not in his official or representative capacity. (*Landon v. Townshend*, 112 N. Y. 93.) The rule is that a former judgment concludes the party only in the character in which he was sued and, therefore, a judgment for or against an executor, administrator, assignee or trustee as such presumptively

does not preclude him, in a different cause of action affecting him personally from disputing the findings or judgment though the same questions are involved. (Bigelow on Estoppel [5th ed], pp 130, 131.)

Had the plaintiff in this case succeeded as assignee for creditors in the former suit, upon a finding that the conveyances were fraudulent, the judgment would not conclude the defendants in this case, in which the plaintiff prosecutes in another character or capacity, and, therefore, the plaintiff is not concluded by a judgment against him as estoppels must be mutual. The plaintiff now prosecuting in his own proper person, representing only his interest as an individual, is not concluded by the prior judgment against him in a representative character because he must now be regarded in law as a different person and a stranger to the former suit. (2 Black on Judgments, § 536; 2 Phillips on Ev. [3d ed.] pp. 8, 9, chap. 1, § 1, sub. 1; *Dutchess of Kingston Case*, 2 S. L. C. [7th ed.] p. 792; *Leggett v. G. N. R. Co.*, L. R. [1 Q. B. Div.] p. 606; *Lander v. Arno*, 65 Maine, 26.)

The judgment of reversal cannot, therefore, be upheld upon the ground taken at the General Term. It is suggested that the finding of fraud by the trial court is not sustained by any evidence and as the court below should have reversed upon that ground the point is available here to support the judgment. We think that the facts and circumstances proved at the trial justified the findings and conclusion. It would be difficult in the absence of explanation to hold that the numerous and complicated transfers of property by the judgment debtor when insolvent to members of his own family followed by agreements and instruments on their part by which the use or income of the property, or at least a portion of it, was secured to him were made in good faith and without any intent to hinder, delay or defraud creditors. What evidence was before the court on the former trial, upon which contrary findings were made, we are not informed by the record. It is possible that the defendants in this case may have relied upon the record of the former judgment as conclusive in their favor

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and omitted evidence in explanation of the transactions that was before the court on the other trial. However that may be, we cannot hold that the findings in this case are without any evidence to sustain them. Nor do we think that the rule applicable to judgments *in rem* can be invoked to uphold the decision below. With respect to such judgments the general rule no doubt is that they are conclusive upon all the world as they adjudge the status of some particular thing. Without attempting to define the cases to which the rule is applicable, it is clear that the judgment against the plaintiff as assignee, is not one of them. It was not a judgment *in rem*. It adjudged a disputed question of fact, namely, that certain conveyances to the defendants by the judgment debtor, were made in good faith. It determined the intent of the parties to certain written instruments, when they were made, and from this followed the legal conclusion that the plaintiff had no cause of action, and is governed by the ordinary rule applicable to former judgments in courts of law and equity. The order of the General Term should be reversed and the judgment of the Special Term affirmed with costs.

All concur.

Judgment accordingly.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Respondent, v. LINA T. COREY et al., Appellants.

While, where under the law there is an entire lack of power to do an act in question, it may not be rendered valid by estoppel, if power to do it existed and there was a way in which it could be lawfully done, and it purports to have been so done, one who has induced another to act upon the assumption that it was in fact so done, may be estopped from questioning its validity.

An estoppel relating to an interest in land passes with the land.

The provision of the Code of Civil Procedure (§ 936), which declares that the certificate of acknowledgment of a conveyance is not conclusive and may be rebutted and its effect contested by one affected thereby, cannot be invoked to prevent the operation of an estoppel by deed.

Where the owner executes a deed of real property and delivers the same, with a certificate thereon of an officer authorized by law to take acknowl-

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edgments, of the grantor's appearance before him at a place within his jurisdiction and of an acknowledgment by said grantor, of its execution, neither the latter nor one claiming title under a subsequent conveyance by him, can subsequently allege the falsity of the certificate or its invalidity, even upon a jurisdictional ground, for the purpose of impairing the estate of the grantee.

In an action to set aside a deed as a cloud on title, both parties claimed by purchase from the same grantor. Defendants' deed, which was the prior one, was perfect and valid upon its face. Upon it was a certificate of acknowledgment in the usual form signed by a notary public in and for the county of S.; the venue of the certificate was laid in that county and its county clerk authenticated in due form the official character of the notary. The deed was recorded in the county of T. where the land was situated and where the grantor lived. It appeared that the deed was in fact executed and acknowledged at the grantor's residence in the county of T.; it was executed for a good consideration, and there was no evidence that the grantor was the victim of any fraud, imposition, or duress. *Held*, that plaintiff was estopped as against defendants from claiming that the deed was not duly acknowledged.

Jackson v. Humphrey (1 Johns. 498); *Jackson v. Schoonmaker* (4 id. 161); *Jackson v. Hayner* (12 id. 469); *Jackson v. Perkins* (2 Wend. 308), distinguished.

M. L. Ins. Co. v. Corey (54 Hun, 393), reversed.

(Argued June 13, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 26, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to set aside a deed as a cloud upon plaintiff's title.

The facts, so far as material, are stated in the opinion.

John J. Van Allen for appellant. The respondent had the burden of the proof. This suit was brought by it to set aside the deed from William G. Corey to his wife and children, which is in all respects regular and valid on its face and is thoroughly prepared and certified for record and duly recorded in the proper county. It certainly is valid, unless impeached by respondent. (*Lawrence v. Farley*, 24 Hun, 293; *Fulton v. Fulton*, 48 Barb. 591; *McLean v. Button*, 19 id. 450;

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Brinckerhoff v. Lawrence, 2 Sandf. Ch. 406; *Zimmerman v. Struper*, 75 Penn. St. 147; *Shurtleff v. Francis*, 108 Mass. 154; *Tompkins v. Wheeler*, 12 Pet. [U. S.] 106; *Garnous v. Knight*, 8 D. & R. 348; *Naldred v. Gilham*, 1 P. Wms. 577; *Boughton v. Boughton*, 1 Atk. 625; *Stirling v. Vaughn*, 11 East. 623; *Exton v. Scott*, 6 Sim. 31; *Brown v. Brown*, 1 W. & M. 325; *Worrall v. Munn*, 1 Seld. 211; *Gilbert v. N. A. F. Ins. Co.*, 23 Wend. 43; *Cocks v. Barker*, 49 N. Y. 107.) The deed from Corey was properly acknowledged and executed. (1 R. S. 101, §§ 11, 14; Laws of 1873, chap. 807; Laws of 1875, chaps. 105, 458; Laws of 1880, chap. 254; Laws of 1883, chap. 140; Laws of 1888, chap. 542; Laws of 1882, chap. 410; *Powers v. Sheperd*, 48 N. Y. 402; *In re Curser*, 89 id. 401; *Smith v. People*, 47 id. 330; 1 Kent's Comm. 521, 523, 524; *Mengon v. People*, 55 N. Y. 613.) If the notary did in fact take the acknowledgment at a place where he was not authorized to take it, it does not render the acknowledgment invalid, he being a public officer entitled to take such acknowledgment, having in fact taken it and made and signed, in his true and actual official character, a proper certificate in due form and regular upon its face, to which is attached a proper certificate of the clerk of his county. The only evil effect from such act would be to subject the notary to criminal prosecution for a breach of duty, or subject him to damages, if made at any improper place. (*Addis v. Graham*, 88 Mo. 197; *Webb v. Webb*, 87 id. 540; *Bradley v. West*, 60 id. 33; *Rockleff v. Morton*, 19 Me. 274; *Wright v. Bundy*, 11 Ind. 398; *McNeely v. Rucker*, 6 Blackf. 391; *Hill v. Bacon*, 43 Ill. 477; *Monroe v. Poorman*, 62 id. 528; *Lickmon v. Harding*, 65 id. 505; *Kern v. Russell*, 18 Am. Rep. 634.) The deed, even though not acknowledged, must be deemed as having been properly executed by the grantor, under his hand and seal, and witnessed by John W. Osborn, the notary public. (*Jackson v. Phillips*, 9 Cow. 93, 112; *Munns v. Dupont*, 3 Wash. C. C. 32, 42; *Kingswood v. Bethlehem*, 1 Green, 228; *Henry v. Bishop*, 2 Wend. 575; *Sharpe v. Orme*, 61 Ala. 263; *Rogers v. Adams*, 66 id. 600; *Carlisle*

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v. *Carlisle*, 78 id. 542; *Bassher v. Stewart*, 54 Md. 376; *Bradford v. Daws*, 2 Ala. 203; *Cahall v. B. Assn.*, 61 id. 235.) If the plaintiff presents a case entitling it to relief, the necessary parties for a complete determination of the action are not present here in court. (3 Wait's Act. & Def. 481.) This action cannot be maintained. (*Bruce v. Davenport*, 1 Abb. Ct. App. Dec. 233; *Krutz v. Craig*, 53 Ind. 561; *Jenkins v. Peyl*, 13 Pet. 241; *Peirsoll v. Elliott*, 6 id. 95; *Gray v. Matthias*, 5 Ves. 286; *Cocks v. Clift*, 2 N. Y. 123; 5 Wait's Act. & Def. 526; *Town of Venice v. Woodruff*, 62 N. Y. 462; Code Civ. Pro. §§ 388, 414; *Brinckerhoff v. Bostwick*, 99 N. Y. 185; *Conklin v. Furman*, 48 id. 527; *Bertine v. Varian*, 1 Edw. Ch. 343; *Bruen v. Hone*, 2 Barb. 586; *Mann v. Fairchild*, 3 Abb. Ct. App. Dec. 152; *Spoor v. Wells*, Id. 199; *Lindsay v. Hyatt*, 4 Edw. Ch. 97; *Elwood v. Deifendorf*, 5 Barb. 398; *White v. M. Church*, 3 Lans. 477; *Peters v. Delaplaine*, 49 N. Y. 362; *Minor v. Beekman*, 50 id. 337; *Hubbell v. Sibley*, 50 id. 468; *Wood v. Wood*, 26 Barb. 356.) The plaintiff is not in a position to maintain this action; it is not a privy with Corey, either in blood or representation, in contract or on account of estate and contract together. It is neither a privy in fact or in law. (*Gilchrist v. Stevenson*, 9 Barb. 9; *M. Bank v. Seaton*, 1 Pet. 309; 2 Man. Ch. 125; *Murray v. Ballou*, 1 Johns. Ch. 566; *Murray v. Finster*, 2 id. 158; *Shepherd v. McEvers*, 4 id. 136; *Griffith v. Griffith*, 1 Pet. 309; *James v. Morey*, 2 Cow. 246.) The deed, in the absence of an acknowledgment, and if not witnessed, in fact containing covenants for further assurance, entitles the grantees to such conveyance as will carry into effect the intention of the parties. (*Grandin v. Hernandez*, 29 Hun, 399; *Wendell v. Wadsworth*, 20 Johns. 659; *Wood v. Chapin*, 3 Kern, 517; Gerard's Title Real Estate, 491, 492; *Jackson v. Alexander*, 3 Johns. 484; *Jackson v. Fish*, 10 id. 456; *Jackson v. Root*, 18 id. 60; *Grout v. Townsend*, 2 Hill, 554; *Rogers v. E. F. Ins. Co.*, 9 Wend. 631.) The deed is good as between the parties to it. There can be no objection to the same person acting

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as subscribing witness and notary at the same time. (*Dole v. Thurlow*, 12 Metc. 157, 166; 2 Black. Comm. 307; 3 Wash. on Real Prop. 272; *Wood v. Chapin*, 13 N. Y. 509; *Roggen v. Avery*, 63 Barb. 65; 65 N. Y. 592; *Strough v. Wilder*, 3 N. Y. Sup. 569; *Chamberlain v. Sprague*, 86 N. Y. 603.) The trial judge erred upon the trial in allowing the witness, Osborn, to testify to communications made to him when the deed was executed, or advice given by him thereon. (Code Civ. Pro. § 835; *Root v. Wright*, 84 N. Y. 72; *Bacon v. Frisbie*, 10 Wkly. Dig. 134; *William v. Fitch*, 10 N. Y. 550; *Briton v. Lorenz*, 45 id. 51; *Yates v. Homestead*, 56 id. 632.) The objection made by defendants' counsel to the question asked Osborn tending to prove that there was no consideration passed for the deed executed by Corey, was well taken, and the trial judge committed a grave error in overruling it and allowing the testimony to be given. (*Wood v. Chapin*, 13 N. Y. 509.)

D. C. Robinson for respondent. The action is maintainable. (*Carpenter v. Carpenter*, 40 Hun, 263; *R. P. Co. v. O'Dougherty*, 81 N. Y. 483; *Coit v. Grey*, 25 Hun, 444; *Ward v. Dewey*, 16 N. Y. 519, 530; *Schroder v. Guernsey*, 73 id. 430; *Sanders v. Village*, 63 id. 492.) The Statute of Limitations is not a bar to the action. (*Miner v. Beekman*, 50 N. Y. 337; *People v. Cady*, 18 J. & S. 399, 403; *Hoyt v. Putnam*, 39 Hun, 402.) Hattie L. Corey was not a necessary party defendant. (Code Civ. Pro. §§ 452, 723, 1015, 3236, 3250.) It was competent to prove by the notary who took the acknowledgment, the place where it was taken. (*Hibbard v. Haughian*, 70 N. Y. 55; *Coveney v. Tannahill*, 1 Hill, 33, 36, 37; *In re Austin*, 42 Hun, 518; *In re Chase*, 41 id. 203.) The Corey deed was not duly acknowledged or attested by at least one witness and is, therefore, of no effect as against the plaintiff. (*Genter v. Morrison*, 31 Barb. 157; *Chamberlain v. Spargur*, 86 N. Y. 603; *Wood v. Chapin*, 13 id. 514; *Ragger v. Avery*, 65 id. 592; *Butler v. Benson*, 1 Barb. 530; *Henry v. Bishop*, 2 Wend. 575; *Gillett v. Stan-*

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ley, 1 Hill, 127.) The exception to the refusal to find that plaintiff had notice of defendants' title when it made the loan to Corey is not well taken. (*Chamberlain v. Spargur*, 86 N. Y. 603; *Genter v. Morrison*, 31 Barb. 157.) Plaintiff's title is perfect. (1 R. S. 738.)

MAYNARD, J. Unless the plaintiff is free to impeach the defendants' deed, because it was never duly acknowledged, the judgment under review cannot stand. Both parties claim title by purchase from the same grantor; the defendants by a conveyance executed and recorded in 1873; the plaintiff by a mortgage given in 1877 and foreclosed in 1881. The defendants' deed is, upon its face, perfect in every respect, and sufficient in form to convey an estate in fee in the lands described in it. The trial court has found that it was freely and voluntarily executed, and for a good but not for a valuable consideration. It was drawn by an attorney and counselor at law, who was lawfully commissioned as a notary public in and for the county of Schuyler, where he resided. The grantor lived in the county of Tompkins, and while the precise location of his residence is immaterial, it appeared that it was but a few rods from the boundary line between the two counties, upon which his farm abutted. The deed was executed and acknowledged at his dwelling house in the county of Tompkins, before the attorney who drew it, who there filled out and signed the certificate of acknowledgment. The venue of the certificate was laid in the county of Schuyler, and the county clerk of that county authenticated in due form the official character of the notary, and the deed was, upon the day of its execution, recorded in the clerk's office of the county of Tompkins, where it has ever since remained of record, or until the entry of judgment in this action. The defendants were minor children of the grantor, the eldest being twelve years of age at the time of the grant. No collusion between the grantees and the notary is proven or charged, and it is not shown that the grantor was the victim of any fraud, imposition or duress.

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Upon these facts we think it cannot be doubted that the plaintiff's grantor, by the act of execution and delivery of the deed, became estopped from insisting, as against these defendants, that it was not duly acknowledged. It is in form unassailable, and purports to be a literal compliance with the requirements of law to make it a valid grant of the entire title, and he could not be permitted to say that it does not speak the truth, or that after its execution there still remained in him the power to grant the property to another and thus defeat its operation as a conveyance. If the acknowledgment out of the county of the notary's residence was unauthorized, the plainest principles of justice would seem to require that the grantor should be debarred from subsequently asserting, to the prejudice of the innocent grantees, that he co-operated with the officer to place upon the instrument a false certificate, which, if honestly done, was an error of judgment; and, if done with evil intent, a crime. The due acknowledgment of the instrument must be held to be beyond the reach of successful contradiction by him. He assumed to convey a title, good as against subsequent purchasers and incumbrances, and it is now sought to cut down the estate, so apparently conveyed, to a partial or modified grant, as it was termed in *Chamberlain v. Spargur* (86 N. Y. 608); or, adopting the descriptive words of the opinion in that case, to convert "a perfect and duly executed grant" into "an imperfect and unattested one." The grantor cannot in this way assail or destroy his grant. He is bound, as between him and his grantee, to uphold the verity of every material fact and admission contained in it. The rule is thus laid down in 2 Hermann on Estoppel (p. 743, § 607): "Where a conveyance sets forth the facts necessary to render it valid, it is conclusive against the grantor, whatever may be its effect as between the grantee and third persons." And, again (p. 749, § 613): "When a deed recites the existence of facts, which render it valid, unless contradicted, the recital may take effect as an estoppel." Also (p. 718, § 585): "So he cannot object that it (his deed) is inoperative by reason of informality of execution."

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Exceptions are allowed in favor of matters not affecting the estate granted, such as the consideration, the date, and the like; but even these are carefully guarded, so as not to let in parol proof which will subvert the grant.

It may be shown that the true consideration is not expressed, but not that there was no consideration, if one is recited. The actual date of execution may be proven, although differing from the date named, unless the effect of the contradiction would be to vary the operation of the instrument, or defeat some right evidently intended to be conveyed, in which cases the recital of the date is conclusive.

We think it may therefore be safely affirmed as a general principle, that where the owner executes and delivers a deed of real property containing upon it a certificate of his appearance before an officer, authorized by law to take acknowledgments, at a place within his jurisdiction and an acknowledgment of its execution, and the certificate is signed by the officer, he cannot subsequently allege the invalidity of the certificate, even upon a jurisdictional ground, for the purpose of impairing the estate of the grantee.

It was virtually so held in the early case of *Jackson v. Colden* (4 Cow. 266), where a mortgage was acknowledged before a New York commissioner in Vermont, but the venue was laid in this state; and the mortgage recorded in the proper county and then assigned by the mortgagee. It was shown by the testimony of the commissioner that the acknowledgment was actually taken in Vermont, but the court say that both the mortgagor and mortgagee were estopped from claiming, as against the assignee of the mortgage, that it was not regularly acknowledged and recorded.

There are other cases holding that the certificate of acknowledgment is not conclusive; but when examined it will be found either that the question did not arise between the parties but between the grantee and third persons, as in *Jackson v. Humphrey* (1 John. 498); or that they were cases where the grantor was incompetent to execute a deed; (*Jackson v. Schoonmaker*, 4 John. 161); or was deceived by the grantee

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(*Jackson v. Hayner*, 12 id. 469); or the deed was not delivered (*Jackson v. Perkins*, 2 Wend. 308.) It might be different if the certificate disclosed that the notary was acting outside of his jurisdiction. But the deed in this case represents him as taking the acknowledgment in the county of Schuyler, where his right to act is unquestioned. Even in the case of an estoppel *in pais*, this would be a sufficient answer to the objection that a void act could not be rendered valid by estoppel. The distinction is very clearly pointed out by Judge FINCH in *Veeder v. Mudgett* (95 N. Y. 295). Where under the law there is an entire lack of power to do the act in question, it cannot be made good by estoppel. But if the power to do the act existed and there was a way in which it could be lawfully exercised, and it purports to have been done in a lawful way, a person who has induced another to act upon the assumption that it was in fact done, in the manner in which it purported to have been done, may be estopped from questioning its validity.

The security of titles to real property would be greatly imperiled if every grantor was at liberty to show that his deed had not in fact been acknowledged before the officer signing the certificate, or that such officer was not within his jurisdiction when the acknowledgment was taken, or that he was not the officer he is represented in the certificate to be. In some states the officer taking the acknowledgment is not a competent witness to prove facts impeaching his certificate. His exclusion as a witness is not put upon the ground of any disqualifying statute, but from considerations of public policy. (*Central Bank v. Copeland*, 18 Md. 305; *Harkins v. Forsyth*, 11 Leigh. 307.)

In *Lickmon v. Harding* (65 Ill. 505) the grantee brought ejectment against the grantor, who attempted to show that the certificate of acknowledgment was false and forged, and it was held insufficient to avoid the deed, BREESE, J., saying: "The magistrate in taking the acknowledgment acted judicially. The duty is imposed upon him by the law of ascertaining the truth of the matters about which he is to certify.

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Parties act on the faith of his certificate, and, in the absence of fraud and collusion, it must be entitled to full credit."

The plaintiff derives its claim of title to the property in dispute from the defendant's grantor by a conveyance subsequently executed, and is concluded by the acts of its grantor which affect the character of the estate previously granted. (2 Herm. on Estoppel, 720; *Goodrich v. Ogden*, 4 Johns. 140; *Bank v. Housman*, 6 Paige, 526; *Hill v. Hill*, 4 Barb. 419; *Lane v. Nickerson*, 17 Hun, 148; *House v. McCormick*, 57 N. Y. 310.)

Where an estoppel relates to an interest in land it passes with the land, and an estoppel by deed creates what in law is termed a title by estoppel. (2 Herm. 712, 718, §§ 578, 685.)

All who are in privity of estate are bound equally with the original parties, and the plaintiff takes nothing by its subsequent conveyance, because its grantor had divested himself of the power to make a further grant which would be effectual. It is evident the plaintiff did not rely upon the defective acknowledgment of the defendants' deed in taking its mortgage. The record of the deed was constructive notice, and in this case, undoubtedly, constituted actual notice to the plaintiff that the title was in the defendants, and that the mortgagor had no estate in the lands which he could encumber. It was, unquestionably, misled by the judgment record which adjudged the defendants' deed to be void because of the mental incapacity of the grantor at the time of its execution, but which was subsequently set aside as to these defendants on account of jurisdictional defects appearing in the judgment-roll. The hardship which the plaintiff encounters is, therefore, not due to any action on its part induced by a knowledge of the want of a sufficient acknowledgment of the defendants' deed; and as the provisions of the Recording Act apply in all such cases, it is not seen how the rule we have here applied can ever work injustice.

Section 936 of the Code, which declares that the certificate of acknowledgment of a conveyance is not conclusive, and that it may be rebutted and the effect thereof contested by a

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party affected thereby, cannot be invoked to prevent the operation of an estoppel by deed. It merely prescribes a rule of evidence, while an estoppel by deed involves a rule of property. It cannot avail to destroy existing property rights, or to avoid the consequences of an act, subsequent to the acknowledgment, which is conclusive upon the grantor and forecloses all investigation into the truth of his representations.

It has been said that estoppels differ from evidence, in this, that the former are received as conclusive and preclude all inquiry into the merits of the title, while evidence is merely the medium of establishing facts which do exist or have existed. (2 Herm. 712.)

The judgment should be reversed and a new trial ordered, with costs to abide event.

All concur, except FINCH, J., not voting, and PECKHAM, J., not sitting.

Judgment reversed.

MARY H. BARRETT, Respondent, v. WILLIAM H. PALMER,
Appellant.

It seems that an action *quare clausum fregit* is local in its character, and the courts of this state have no jurisdiction where the trespass is upon lands in another state.

The power of the federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state and separate a part of its territory from its jurisdiction, and the jurisdiction and authority of the state over lands so acquired by the United States by the exercise of the power of eminent domain, remains unchanged, except so far as their use for the purposes for which they were required necessarily removes them from the domain of state authority.

The state may cede to the United States political jurisdiction over such lands, in which case congress may legislate in regard to them.

In such case, however, until congress makes new regulations touching the administration of justice in civil actions arising in the territory, the municipal law of the state controls and remains unchanged.

As to whether even where congress has exercised this power, the state courts would be powerless to redress private injuries committed on the territory *quare*.

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In an action of trespass brought in the City Court of Brooklyn, it appeared that the *locus in quo* was originally part of the Brooklyn navy yard, belonging to the United States, political jurisdiction over which, with certain reservations, was ceded by this state to the United States. (Chap. 855, Laws of 1853.) Congress has not legislated in reference to civil actions arising in the territory. The federal authorities leased part of the lands, including the *locus in quo*, or permitted the city to use it for a market. The city leased it, and plaintiff was in possession as sub-tenant. Defendant moved to dismiss the complaint on the ground that the trespass complained of was upon land belonging to the United States, and that the court had no jurisdiction. This motion was denied. *Held*, no error.

(Argued June 14, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made October 26, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

M. L. Towns and *Henry C. De Witt* for appellants. The City Court of Brooklyn had no jurisdiction to try this case. (*Main v. Cooper*, 25 N. Y. 180; *Kelly v. N. Y. & M. B. R. R. Co.*, 81 id. 233; *Wickam v. Freman*, 12 John. 173; *Sage v. Harpending*, 34 How. Pr. 1; *McKeller v. Ziegler*, 47 id. 20; *Proctor v. Tows*, 115 Ill. 138; *McCann v. Rathbone*, 8 R. I. 403; *Frank v. Nichols*, 6 Mo. App. 72; *Rice v. Dudley*, 65 Ala. 68; *Douglass v. Geiler*, 32 Kan. 499; *Morgan v. Smith*, 70 N. Y. 537; *Clark v. Cummings*, 5 Barb. 339.) Had the jury the two leases before them they could not have given the enormous verdict against the defendants which they did give. (Sedg. on Dam., chap. 5, p. 266.) The plaintiff's action being "*trespass quare clausum fregit*" concerning lands in territory of the United States, this court has no jurisdiction of the cause of action. (*Dodge v. Colby*, 108 N. Y. 445; *A. T. Co. v. Middleton*, 80 id. 258; *Cragin v. Lovell*, 88 id. 263; *Watt v. Kinney*, 6 Hill, 87; Code Civ.

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Pro., § 263; *Cohen v. Virginia*, 6 Wheat. 428; *U. S. v. Cornell*, 2 Mason, 66; *U. S. v. Meagher*, 37 Fed. Rep. 875; *Scott v. U. S.*, 1 Wyo. 40; *F. L. R. R. Co., v. Lowe*, 114 U. S. 525; *C. R. I. & P. R. R. Co. v. McGlinn*, Id. 462; *Davidsburgh v. K. L. Ins. Co.*, 90 N. Y. 526; *Robinson v. O. S. N. Co.*, 112 id. 315.)

Hugo Hirsh for respondent. The ruling of the trial court was correct. (Code Civ. Pro., § 263; *Mostyn v. Fabrigas*, 1 Cowp. 180; *Delamater v. Folg*, 50 Hun, 528, 532; 31 How. Pr. 420; *T. Co. v. Middleton*, 80 N. Y. 408; *Armstrong v. Foote*, 19 How. Pr. 237; 11 Abb. Pr. 384; *C. & P. R. Co. v. McGlinn*, 114 U. S. 542.)

O'BRIEN, J. The plaintiff recovered a verdict against the defendants in an action alleging a trespass. The facts are undisputed that in February, 1889, the defendant, Palmer, leased to the plaintiff certain booths or market stands in the Wallabout Market, Brooklyn, for two years, and that the plaintiff had paid to him the rent reserved by the lease up to July, 1889. That in April, 1889, the defendants, acting together without right, took possession of the stands, ejected the plaintiff therefrom, and destroyed or converted to their own use certain fixtures and other property and have ever since excluded the plaintiff from possession. There can be no doubt that the general jurisdiction of the City Court of Brooklyn where the trial was had extends to actions of trespass such as this. (Code, §§ 263, 3343.) The only question raised at the trial that is now open for review would apply to any other state court as well as to the one in which the trial took place. The *locus in quo* was originally a part of the Brooklyn Navy Yard, jurisdiction of which had been ceded to the United States by chapter 355 of the Laws of 1853. The federal authorities subsequently leased a part of the land acquired under this act to the city of Brooklyn for a market or at least permitted the city to use it for that purpose. The authorities of the city leased several market stands to the defendant,

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Palmer, and he sublet some of them to the plaintiff. At the close of the evidence, the counsel for the defendants moved to dismiss the complaint on the ground that the trespass complained of was upon territory or a reservation belonging to the United States, and that the court had no jurisdiction of the action. This motion was denied and the defendants excepted. The verdict of the jury was \$1,520, and while the General Term might very properly have exercised its power to reduce it, we cannot. There was evidence for the consideration of the jury and under such circumstances this court will not attempt to revise their action.

There can be no doubt that an action of trespass *quare clausum fregit* is local in its character and the courts in this state have no jurisdiction when such trespass is committed upon lands in another state. (*Dodge v. Colby*, 108 N. Y. 445; *Cragin v. Lovell*, 88 id. 258; *American Union Tel. Co. v. Middleton*, 80 id. 408.)

The jurisdiction of a Superior City Court is always presumed (Code, § 266), and by subdivision three of section 263 of the Code, the City Court of Brooklyn has jurisdiction of all such actions as this where the real property is situated within the city, or where the defendant is a resident of the city, or where the summons is personally served upon the defendant therein. It is certain that all these conditions exist in this case. The contention of the learned counsel for the defendant must, therefore, rest upon the proposition that the state has no power to confer jurisdiction upon its courts to redress injuries of this character when committed upon lands acquired by or ceded to the United States. The power of the federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state and separate a part of its territory from its jurisdiction. When the lands are acquired by the exercise of the power of eminent domain the United States becomes simply an ordinary proprietor, and the jurisdiction and authority of the state over the lands remain unchanged, except so far as their use for the purpose of executing the powers of the general government

necessarily remove them from the domain of state authority. But it has been held that the state may cede to the general government political jurisdiction over such lands, and then congress has the power to legislate in regard to them. We are not disposed to hold that even then the judicial power of the courts of this state would be powerless to redress private injuries committed thereon or that the injured party would be compelled to seek justice in some other jurisdiction.

The State did cede such political authority to the federal government with respect to the lands in question, with certain reservations. Congress has not, however, made any new regulations touching the administration of justice in civil cases with respect to actions arising therein, and until some such regulations have been made the municipal law of the state for the protection and enforcement of private rights through the courts remain unchanged. (*C. & P. R. Co. v. McGlinn*, 114 U. S. 542; *F. L. R. Co. v. Lowe*, Id. 525.)

The cession of territory by one sovereignty to another does not abrogate the laws in force at the time of the cession for the administration of private justice. Not at least until the new sovereignty has abrogated or changed them do such laws cease to operate, except possibly so far as they may be in conflict with the political character, institutions and constitution of the government to which the territory is ceded. Mr. Justice FIELD, in the Supreme Court of the United States, in the case of *C. & P. R. Co. v. McGlinn* (*supra*), stated the rule of international law on this subject as follows: "It is a general rule of public law recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, the laws which are intended for the protection of private rights, continue in force until abrogated by the new government or sovereign."

As nothing has been done by congress to displace the laws of this state and the jurisdiction of its courts in regard to private rights and remedies with respect to the lands ceded

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for the purpose of a navy yard in Brooklyn, these matters remain unaffected by the act of cession.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

In the Matter of the VILLAGE OF OLEAN, Respondent, *v.*
JOHN J. STEYNER et al., Appellants.

135	341
141	300
135	341
162	228

A municipality by commencing proceedings under its charter to acquire land for the purposes of a street admits the landowner's right, and it may not claim in such proceedings that the land has been dedicated by the owner to the public use as a highway.

In such proceedings, commenced by the trustees of a village, it appeared that the landowners had acquired title under deeds which recognized as a street the land sought to be acquired as laid out upon a map made by a former owner, who sold and conveyed by descriptions referring to said map, and that they had conveyed lots to different parties, by descriptions referring to that map and bounding the lots by said street as laid out on said map. *Held*, that the grantees of the original owner and the subsequent grantees in turn acquired an easement in the strip so designated as a street, and all the parties having recognized the map and bought and sold with reference to it, they had the right to have the strip kept open to its full width, after the manner and with the characteristics of a street and so, that said owners were only entitled to nominal damages. It appeared that the contesting landowners had fenced in, planted and adorned the strip, and one of them had a house upon it; they claimed that the easement was extinguished by adverse possession. *Held*, that an adverse possession could not be founded upon these acts, because of the presumption flowing from the acceptance by them of their deeds and from the conveyances made by them; that they entered in subordination to the servitude imposed, and occupied only temporarily until the use of the easement should be required.

In re City of Brooklyn (73 N. Y. 184), distinguished.

(Argued June 15, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made April 16, 1891, which affirmed an order of the county judge of Cattaraugus county confirming the report of commissioners appointed to

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assess damages in a proceeding to acquire lands for street purposes in the village of Olean.

The facts, so far as material, are stated in the opinion.

Frank Rumsey for appellant. There was never a dedication by the owners of the lands in controversy for a public street. (48 Hun, 488; *N. F. S. B. Co. v. Bachman*, 66 N. Y. 261.) A dedication of the *locus in quo* for a public street would be ineffectual if revoked before acceptance by the public authorities. (*Holdane v. Trustees, etc.*, 21 N. Y. 474; 48 Hun, 488.) There was never any acceptance of a dedication of the land by the public authorities. (*In re Rhineland*, 68 N. Y. 105.) The commissioners take the position that in case the land was not dedicated and accepted the owners are not entitled to compensation, for the reason that it is incumbered by private easements or rights of way over it by owners abutting on this paper Fifth street. This claim is without substance. (*In re Eleventh Avenue*, 81 N. Y. 436; *Brill v. Brill*, 108 id. 511; *Corwin v. Corwin*, 24 Hun, 147.) By the deeds from Sewells to Savage of the blocks on either side of this strip, and by the deed from Savage to Steyner in like manner, both Savage and Steyner acquired title to the strip, subject to any rights of the public in the strip as a public street, and subject to any easements which prior grantors from same common grantor may have in that part last deeded. (*F. Ins. Co. v. Stevens*, 87 N. Y. 287.) This proceeding is proper only when it is conceded by the petitioner or municipality, that the lands or easements sought are owned by the respondents, and it is desired to fix and assess the damages for the taking of such lands or easements, and is not a proper proceeding in which to test or try the title of the parties to the lands or easements. (*In re City of Yonkers*, 117 N. Y. 572; Laws of 1882, chap. 110.) The statute limiting an appeal and making the order of the county judge final and conclusive refers to and affects only the question of the amount of damages, and is not intended to prevent a review of legal errors. (*In re P. P. & C. I. R. R. Co.*, 20 Hun, 184; *N. Y. C. R.*

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R. Co. v. Marvin, 11 N. Y. 278; *In re Canal and Walker Streets*, 12 id. 411; *Starr v. Trustees, etc.*, 6 Wend. 564; *Staples v. Fairchild*, 3 N. Y. 41; Code Civ. Pro. § 190, subd. 3.)

Fred. L. Eaton for respondent.

FINCH, J. A motion is made to dismiss this appeal founded upon the provision of the charter of Olean, which makes the order of the commissioners when approved by the county judge final. We do not decide that question since we are all agreed that the judgment should be affirmed, and prefer to dispose of the case on its merits.

I do not see how the village of Olean can raise the question of a dedication to the public use in this proceeding, for its very existence and prosecution necessarily involves an admission of the landowner's right, and an inquiry into his damages resulting from a necessary taking of that right. If Fifth street was in truth dedicated to the public use, and that dedication accepted by the municipal authorities, the commissioners were at liberty to open the street and occupy and maintain it without any proceeding whatever, because simply engaged in regulating and improving a street belonging as such to the village. But the municipality waived any such claim, if it existed, by proceeding under the charter to condemn the landowner's right, and to assess his damages for what was proposed to be taken from him. Manifestly, the village conceded his right when it instituted a proceeding to take it away, and under a provision of the charter having no application except where there is an owner other than the village and whose title is to be divested. To say that there is not such owner, and that the easement sought to be condemned belongs to the municipal corporation by the act of the owner, is to deprive the proceeding of all foundation and invite its dismissal for that reason. The order cannot be sustained on such ground, for the charter does not authorize a taking of the fee, but only an easement for a village street, and precisely that easement had

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already passed if there had been a dedication and acceptance, and the municipality finds itself in the awkward position of seeking to condemn its own property for its own use. The question thus necessarily becomes one, not of condemnation, but of title, and ends in the inquiry whether the village owns or does not own the easement, and that question cannot be raised or tried in a proceeding which assumes the landowner's conceded right, and is framed solely to ascertain his just compensation for parting with it.

But assuming that there was no dedication of Fifth street to the public use, and that the proceeding instituted was, therefore, properly commenced and had a substantial purpose to accomplish, it does not necessarily follow that the commissioners made an error of law in awarding nominal instead of substantial damages. By the village charter it was their duty to award such damages only after deducting therefrom the benefit to the owner from the opening of the street, and it was proved that both of the owners who are defending had accepted deeds which recognized Fifth street as laid out upon the Gosseline map, and had conveyed to other parties by a description referring to that map and bounding the parcels by Fifth street as thereon delineated. The whole area of land in question was formerly owned by Mrs. Sewell. The Gosseline map was made in 1836 when speculation in real estate reached its highest tide and almost every owner was insane with expectation. That map spread the village over Mrs. Sewell's land, which was wholly unimproved, and covered by the natural forest, and which it has taken the village fifty years to reach and need. After Mrs. Sewell's death her executors conveyed to Sineon Savage eight lots on block forty-one as laid out on the Gosseline map. This deed was in 1862. Four years later the heirs at law of Mrs. Sewell conveyed another large portion of the property to Savage, and in 1869 the substantial balance to Blakeslee. The grantees of the latter and those of Savage, with the exception of Steyner and Mrs. Dilks, have joined in the request to open the street and released all claims for damages. The lots conveyed to Steyner were deeded to his

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grantor, Savage, by the heirs at law of Mrs. Sewell, and the question raised by the appellants of the power of her executor to convey, and especially to impose a servitude upon the land, does not concern Steyner, and only in small degree Mrs. Dilks, most of whose lots also came from the heirs at law. All these conveyances recognized and adopted the Gosseline map, and described the premises granted as the lots and blocks delineated on that map, which thus became an essential element of the description. In addition to this characteristic of the conveyances to Steyner and Mrs. Dilks it appears that there were deeds from them which equally recognized the map and the existence of Fifth street. In 1885 Steyner deeded to Martha Black part of lots two and four in block fifty-five, according to the Gosseline map, commencing at the intersection of the west line of Fifth street with the south line of Sullivan street, and further bounding the premises by the west line of Fifth street. In 1880 Mrs. Dilks conveyed to Anna Curtis the east part of block forty, as distinguished on the Gosseline map; the further description showing a frontage on Fifth street to the east and on Sullivan street to the south. It seems to be quite clear that the grantees of the Sewell estate and their grantees in turn acquired an easement in the strip designated as Fifth street and appurtenant to their property. All the parties have recognized the Gosseline map, and bought and sold with reference to it, and enough is shown to establish in them a right to have the strip kept open to its full width after the manner and with the characteristics of a village street. (*Bissell v. N. Y. Cent. R. R. Co.*, 23 N. Y. 63; *In the Matter of Opening Eleventh Avenue*, 81 id. 446.) In the first of these cases the map was made by the grantor, but in the second by the city authorities, and then recognized and adopted by the grantor for the purposes of the conveyance. In both cases it was held that the grantees took an easement in the projected street, and were entitled to have it kept open for public use, although it did not thereby become a highway until accepted as such by the public authorities; and the same doctrine is asserted broadly and at length in *White's Bank*

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of *Buffalo v. Nichols* (64 N. Y. 73). This right accruing against the grantors gave similar rights to all the grantees, who, as between themselves, could extinguish the servitude only by the united act of all. And the two defendants here made the incumbrance much more certain by themselves granting parcels according to the Gosseline map, and more or less distinctly recognizing the projected and intended Fifth street. Not to open it, and barring the public from it, would operate as a fraud upon the grantees, who must be presumed to have bought and paid for the appurtenant convenience and benefit.

The principal answer made by the appellants is that the easement was extinguished by an adverse possession of Steyner and Mrs. Dilks. The former fenced in the strip and planted and adorned it, and the latter owned a house upon it. These acts might found an adverse possession but for the presumption flowing from the acceptance by the appellants of their deeds, and from the conveyances made by them, that they entered in subordination to the servitude imposed, and occupied in like manner and only temporarily until the use of the easement should be required. (*Smyles v. Hastings*, 22 N. Y. 217; *Bridges v. Wyckoff*, 67 id. 132.) That occupation was not necessarily adverse while no grantees needed or sought to use the easement, and must be regarded as temporary and in subordination to the existing right under which the entry was made, and which the appellants themselves recognized largely within the twenty years by their own conveyances.

The commissioners, therefore, could only award to the owners the value of the public easement taken, deducting therefrom the value of the private easement, which already incumbered the property. (*Matter of City of Brooklyn*, 73 N. Y. 184.) It is quite evident that the public right taken, deducting therefrom the value of the private easement, leaves only a nominal injury, because the added burden is itself but technical and nominal. The real burden is in no manner increased by absorbing the private in the public right, or substituting the latter in the room and stead of the former, since as bur-

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dens on the land they are substantially identical. In the case of city streets, where under the statute the fee is taken, we have recently held that substantial damages should be awarded (*City of Buffalo v. Pratt*, 131 N. Y. 297), but here the fee is not taken, but an easement for a highway only, which is merely the equivalent of the private easement displaced. The change alters the control, but does not increase the burden. When to this is added the fact that the commissioners were required to personally examine the premises and take into account the benefits resulting from opening the street, it is apparent that we cannot say, as matter of law, that there were substantial damages, or that more than nominal damages should have been awarded.

The order should be affirmed, with costs.

All concur.

Order affirmed.

WILLIAM HUGHES, as Executor, etc., et al., Appellants, v.
GEORGE BINGHAM et al., Respondents.

A town, in its corporate capacity, has power to take lands for highway purposes, by conveyance voluntary or otherwise.

The power to take by voluntary conveyance implies the power to take such interest as the necessity of the case, or the public good, may require, and so, where a use for only a portion of the year is required, the town may take a conveyance limited to such use.

In proceedings under the statute, the highway commissioners of a town made an order laying out a highway. The landowners appealed therefrom, and while the matter was pending before referees, said owners, for the purpose of inducing the referees to reverse the order appealed from, executed and delivered to them a deed to the town of an interest in the land described in the order, which interest was described in the deed as "the perpetual right of use of the above-described road during the time intervening between the first day of December and the first day of May in each and every year." The town was granted "the right to enter upon and work said road at any season of the year, provided that, at any other period than the one above mentioned, the gates upon said road shall be kept closed." The referees, influenced by the deed, reversed the order, and filed the deed and their order with the town clerk. The commissioners of highways directed the road to be worked as a highway, and

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it was so cared for and worked for two years. In an action by the owners to restrain the overseer of highways, and others acting under him, from working said road as a highway, *held*, that the deed was valid, and vested a title in the town according to its terms and for the purposes mentioned therein; and so, that the complaint was properly dismissed.

Also *held*, that conceding the deed to be invalid, the court below had power in its discretion to deny the equitable relief sought, and leave the plaintiffs to their remedy at law.

After the delivery and acceptance of the deed, and a recognition of the road as one of the town highways, a resolution was passed at a town meeting "not to accept the road." *Held*, that this did not effect a discontinuance of said highway.

A town meeting has no power to discontinue a highway once established: that can be done only by the intervention of the authorities, and according to the procedure prescribed by statute. (1 R. S. 502, § 8.)

(Argued June 15, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made October 13, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Scripture & Backus for appellant. The deed does not create a public highway nor a private road. (*Jones v. Davis*, 35 Wis. 376; *State v. Green*, 41 Iowa, 693; *Shellbarger v. State*, 110 Ind. 509; *Cyr v. Madore*, 73 Me. 53; *People v. Jackson*, 7 Mich. 446; *Kennedy v. Williams*, 87 N. C. 6; 28 Wis. 148; 24 N. J. L. 748; *Pool v. Hoskisson*, 1 M. & W. 827; 11 Barb. 463.) The road in question fettered as it is with conditions and limitations, is one that a commissioner of highways has no power to lay out or accept. (*Fowler v. Lansing*, 9 Johns. 349; *Morse v. Williamson*, 35 Barb. 472; *Webb v. Albertson*, 4 id. 51.) The commissioner of highways had no power to accept the road in question, and the findings establish that it was not accepted by the town in any manner. (1 R. S. 337, § 1; *Vail v. L. I. R. R. Co.*,

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106 N. Y. 287; 71 Me. 144.) The facts, with the merits decided in our favor, entitle us to maintain this action. (*Livingstone v. Livingstone*, 6 Johns. Ch. 501; *M. & H. R. R. Co. v. Artcher*, 6 Paige, 83, 88; *Davis v. Lambertson*, 56 Barb. 485; *Carpenter v. Gwynn*, 35 id. 395; *L. C. F. Co. v. L. G. F. Co.*, 82 N. Y. 476, 486; *Wheelock v. Noonan*, 13 N. Y. S. R. 110, 114; 35 Hun, 109; 13 id. 285; 45 N. Y. 703; 40 id. 191; 55 id. 220.)

E. L. Stevens for respondent. An injunction should not be granted in this case. (*T. & B. R. R. Co. v. B. H. T. & W. R. Co.*, 86 N. Y. 107.) Towns are authorized to purchase and hold lands for the use of the inhabitants. (*Vail v. L. I. R. R. Co.*, 106 N. Y. 283, 287.) The land in question, was, by deed of the plaintiff and Frank White to the town of Western, dedicated to the use of the public as a highway forever. To make it such no formal laying out was necessary, it was only necessary that it should be accepted. (*People v. Loehfeln*, 102 N. Y. 1; *City of Oswego v. O. C. Co.*, 2 Seld. 257; *Trustees, etc., v. Otis*, 37 Barb. 50, 56, 57; *Cook v. Harris*, 61 N. Y. 454.) A highway once established, does not cease to be such until it has been discontinued by the proper authorities. (*Driggs v. Phillips*, 103 N. Y. 77; *Monk v. Town of New Utrecht*, 104 id. 557.) There is now no statutory requirement to be pursued in the laying out of any new road, where the same is laid out with the consent in writing of the owner or owners of the land to be taken. (2 R. S. [7th ed.] 1230, § 60; Laws of 1881, chap. 696.) The highway commissioner had a right to accept the highway offered by the deed. (37 Barb. 50, 56, 57, 58; 2 Seld. 263, 264; 61 N. Y. 455; 74 id. 311-315; 104 id. 557; *Davenpeck v. Lambert*, 44 Barb. 596; *Davis v. Stephens*, 7 C. & P. 570.)

O'BRIEN, J. The plaintiff sought the aid of a court of equity to restrain the defendants from working a highway which he had granted to the town, but under circumstances

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and with conditions and restrictions that, as he claims, render the grant absolutely void. The trial court refused to interfere and we think its decision rests upon correct principles.

It has been found upon sufficient evidence that in October, 1890, the highway commissioner of one of the towns of Oneida county, as a result of proceedings under the statute and the finding of a jury, made an order laying out a highway over and across the lands of Jones, the original plaintiff in this action and the present plaintiff's testator, and also the lands of one White. These two landowners brought an appeal from this order claiming that the highway was unnecessary and the proceedings erroneous, and referees were appointed under the statute to hear the parties and determine the appeal. While the matter was pending before the referees, the landowners, for the purpose of inducing the referees to reverse the order appealed from, delivered to them a deed made and executed by the appellants and their wives to the town, whereby, in consideration of one dollar, they conveyed to the town and its successors the interest in the real estate described in the order by the highway commissioners as follows:

"The interest hereby conveyed is the perpetual right of use of the above described road as a public highway during the time intervening between the first day of December and the first day of May in each and every year hereafter, no damage to be claimed from the town unless said road is subsequently laid out as a public highway under the statute. This grant is upon the express condition that no road shall hereafter be laid across the premises of said Jones and White, from the hill, without their consent. In case any such road be laid out, this conveyance to be void and of no effect; said second party to have the right to enter upon and work said road at any season of the year, providing that at any other period than the one above mentioned, the gates upon said road shall be kept closed."

This deed had the effect of influencing the referees to reverse the order appealed from and pending before them, and they did reverse it on the 30th of September, 1887, and the

deed with their decision was filed with the town clerk of the town, and subsequently accepted and recorded, the town board auditing the bill for the expense of procuring it to be recorded. The commissioner of highways annexed the road to one of the highway districts and directed that it be worked as a highway under the direction of the defendant, Bingham, as overseer, and it was cared for and worked as one of the highways of the town for about two years, until Bingham and the other defendants, acting under his direction and authority, were restrained by the injunction procured by the plaintiff at the commencement of the action. The trial court held that by the delivery and acceptance of the deed the *locus in quo* was dedicated to the public as a highway and the complaint was dismissed. The General Term affirmed the judgment. During the pendency of this appeal the original plaintiff died and his executor, who now appears as plaintiff on the record, was substituted. It is not claimed that the conveyance is any the less binding upon the grantors therein by reason of the finding that it was given for the purpose of influencing the result of a legal proceeding, judicial in its character, and had that effect. This finding does not necessarily imply any corrupt act on the part of the referees or the owners of the land, and it is not likely that any such meaning was intended to be given to it. The presentation of the deed to the referees informed them that the town was in that way to obtain all that it could by the order appealed from, and thus they concluded to end the litigation by a reversal of the order. Whatever may be said in criticism of this method of disposing of the appeal, the transaction is not urged or relied upon as a reason for relieving the plaintiff from the full force and effect of his grant and obviously cannot be. The circumstances under which the deed was given and the purpose it was intended to subserve may be considered by a court of equity when its discretionary power is invoked by the plaintiff for the purpose of relieving himself from its obligations, but the plaintiff would not be heard to urge them for the purpose of overthrowing his grant if otherwise valid.

There are many cases where the complaining party will be denied equitable relief and left to his remedy at law, and the judgment in this case might well be sustained on that ground alone. Assuming, as is urged in behalf of the plaintiff, that the deed is not valid, still equitable relief was not a matter of absolute right, but of discretion. (*Calhoun v. Millard*, 121 N. Y. 68.)

But we think that the deed is valid and vests a title in the town, according to the terms and for the purposes mentioned therein. A town in its corporate capacity has power to take lands for highway purposes by conveyance, voluntary or otherwise. (*Vail v. Long Island R. R. Co.*, 106 N. Y. 287; 1 R. S., p. 337, § 2.)

The right to take lands by grant for general highway purposes is conceded by the learned counsel for the defendant, but it is urged that the town could not take under a conveyance subject to such conditions and restrictions as were incorporated in the instrument in this case. These are (1) that the lands may be used as a highway from December till May in each year; (2) to be worked at any time; (3) gates to be kept closed from May till December.

The power to purchase or take lands by voluntary conveyance, for highway purposes, implies the power to take such interest as the necessity of the case or the public good may require. The proposition that the town or the commissioner of highways can take only for a highway to be kept open to the public at any or all times, or not at all, is not supported by authority, or any controlling or satisfactory reason. The argument urged is that a commissioner, or the town itself, cannot burden the community with the support of highways, except such as are open and free to all the public at all times. It may be that where it is sought to obtain lands by proceedings *in invitum*, for highway purposes, that the statutory power must be pursued strictly and no interest can be condemned, except such as the statute prescribes.

As we understand the findings in this case, precisely the same qualified interest was taken under the order of the high-

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way commissioner, laying out the road, as was subsequently described in the deed, and this may have induced the conveyance. It does not follow that because these lands could not be condemned for such a road as this, that the owner could not convey, and the town accept them, for the qualified use described in the conveyance. Whenever a town has a highway that it does not need, or some limited right to use land for highway purposes that is not necessary for the public convenience, it can readily abandon or discontinue such road. In this case it appears that the road in question was needed only during the winter months. It is quite conceivable that a like necessity may, during the same season of the year, exist in many other towns. To say that while the town or the commissioner has capacity to take a grant of land for general highway purposes, but is utterly without capacity to take a limited or qualified grant to supply such a public necessity as may, and probably in many cases does exist during the winter months, is to fix a limit upon powers conferred for the public good that would be quite unreasonable, if not absurd. There were seven months of the year in which the public had no use for this road, and it was provided that during these months the gates should be kept closed. This was the season of the year, however, when it is possible to make repairs on roads, and it was stipulated that the highway commissioner might then make such repairs or do such work on the road as he thought the public interest required. The capacity to take a grant in fee for highway purposes must, upon every just principle of construction, as well as upon reasons growing out of the necessity of the case, be deemed to include the power and capacity to take an interest less than a fee, or upon conditions such as were inserted in this deed. The town is expressly authorized by the statute to take conveyances of lands "for the use of the inhabitants," and this fairly includes a qualified or limited estate, as well as a fee. It appears that after the deed was delivered by the grantors, and accepted by the grantee, that a town meeting resolved "not to accept the road."

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It is said that this resolution was passed at the instigation of and through devices of the grantors in the deed, after they had attained the end which its delivery was intended to promote, namely, the termination in their favor of the appeal from the order of the commissioner. However that may be, the deed had been then delivered and accepted and the road recognized by the proper authorities as one of the highways of the town. A town meeting has no power to discontinue a highway once established. That can be done only by the intervention of the authorities and according to the procedure pointed out in the statute, and a town meeting is no part of these. (1 R. S. 502, § 3; *Driggs v. Phillips*, 103 N. Y. 77-83; *Monk v. Town of New Utrecht*, 104 id. 557.)

The judgment should therefore be affirmed, with costs.

All concur.

Judgment affirmed.

PETER J. FERRIS, as Trustee, etc., et al., Respondents, v.
SAMUEL B. HARD et al., Appellants.

An allegation contained in an answer which has no reference to and does not admit any allegation of the complaint, is not a conclusive admission, and the defendant is not estopped thereby from proving a fact inconsistent with the allegation.

In an action to foreclose a mortgage, executed in 1874 by husband and wife, upon land owned by the wife, securing the payment of a bond executed by the husband, which bond by its terms was conditioned for the payment of \$10,000, with interest, in four annual payments, the answers of the mortgagors alleged, in substance, as an affirmative defense, that the mortgage was executed to secure loans theretofore made and thereafter to be made to the obligor, denied that the sum stated was due thereon, and asked for an accounting. The complaint contained no averments as to the consideration. On the trial the husband testified that nothing was said at the time he executed the mortgage that it was to secure loans theretofore or thereafter made; but that the bond and mortgage were executed to be sold. The wife, to explain the contradiction between the answers and the husband's testimony, then offered to show that the latter informed the attorney who drew the answers that the bond and mortgage were executed and delivered to be sold, as absolute

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securities for his benefit, not as alleged in the answers; that the attorney advised him there was no legal difference, that the mortgagee would have the right to hold them as such securities, and that relying upon this advice, he and his wife put in the answers. This evidence was excluded on plaintiffs' objection. *Held* error; that plaintiff having permitted without objection the evidence to be given contradicting the answer, it was too late to claim that defendants were concluded thereby; and that defendants were entitled to an explanation of the contradiction; also, that the alleged admissions in the answers were not of such a character as to require the exclusion on that ground of evidence of an inconsistent fact.

The mortgage was executed to one B., and purports to secure payment to him of the sum named. The alleged indebtedness secured was to a firm of which B. was a member; it was claimed on the part of the wife that, as she executed the mortgage as surety for her husband, the contract was to be strictly interpreted in her favor, and it could not be enforced as security for the firm debt. *Held*, untenable; that either party to the instrument was entitled to show by parol, for any purpose except to prevent its operation as a valid mortgage, or to enlarge the liability incurred, that the consideration was different from that therein stated; and that this principle was not affected by the fact that one of the parties was a surety.

Also *held*, that as interest after the mortgage debt became due could only be recovered as damages at the rate prescribed by law, plaintiff was entitled to seven per cent on all sums unpaid up to the time the legal rate was reduced to six per cent, and from that time at that rate.

(Argued June 18, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made July 16, 1891, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

George Wadsworth for appellants. The mortgage is only security for the debt evidenced by the bond, and the assignee took it subject to all defenses and equities. (*Trustees, etc., v. Wheeler*, 61 N. Y. 88.) When a wife mortgages her real estate to secure payment of her husband's debt she is a surety, and has all the rights, privileges and defenses of a

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surety. (*Bank of Albion v. Burns*, 46 N. Y. 170; *Vartice v. Underwood*, 18 Barb. 561; *E. C. S. Bank v. Roop*, 80 N. Y. 591, 597; *Loomer v. Wheelwright*, 3 Sand. Ch. 135; *Smith v. Townsend*, 15 N. Y. 479.) Margaret H. Hard was a mere surety for her husband's debt, and her liability cannot be extended beyond the precise literal terms of her contract. (*Walsh v. Bailie*, 10 Johns. 180; *K. M. I. Co. v. Clark*, 33 Barb. 196; *N. M. B. Assn. v. Conkling*, 90 N. Y. 117; *Ward v. Stahl*, 81 id. 406.) The mortgage cannot be enforced as security for the payment of S. B. Hard's debt to Lyon, Bork & Co., or any other firm; although Joseph Bork was a member of such firm, it is good only as security for a debt owing to Joseph Bork personally. (*Walsh v. Bailie*, 10 Johns. 180; *Penoyer v. Watson*, 16 id. 99; *Dobbin v. Bradley*, 17 Wend. 422; *Birckhead v. Brown*, 5 Hill, 634; *Bigelow v. Benton*, 14 Barb. 123; *Barns v. Barrow*, 61 N. Y. 39.) Debts contracted after the mortgage was given are not within its terms, and it is not security for their payment. (*Simons v. F. N. Bank*, 93 N. Y. 269; *Bank of Albion v. Burns*, 46 id. 170.) When the contract is in writing the surety cannot be held to perform another agreement not written, even if the parol agreement truly expresses the intent of the parties and the written one does not. (*Hamilton v. Van Rensselaer*, 43 N. Y. 244; *E. N. Bank v. Kaufman*, 93 id. 273; *Rindge v. Judson*, 24 id. 64; *McCluskey v. Cromwell*, 71 id. 593; *Newell v. People*, 7 id. 97; *Ludlow v. Simond*, 2 Caine's Cas. 1, 28; *Kelso v. Taber*, 52 Barb. 125; *C. E. Ins. Co. v. Babcock*, 42 N. Y. 643; *Yale v. Dederer*, 18 id. 265, 276.) The referee allowed too much interest. (*O'Brien v. Young*, 95 N. Y. 428; *Bennett v. Bates*, 94 id. 354, 374; *Taylor v. Wing*, 84 id. 471, 477; *Siewert v. Hamel*, 40 Hun, 44, 46.)

Price A. Matteson for respondents. An objection that there is a misjoinder of parties plaintiff must be taken by demurrer. (Code Civ. Pro. § 488, subd. 5, § 499.) Even if, as between Mrs. Hard and her husband, she was his surety, the statement

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of the account of Lyon, Bork & Co., made to Mr. Hard is part of the *res gestæ*, and was competent evidence. (*Hatch v. Elkins*, 65 N. Y. 496; *Bulluck v. Boyd*, 2 Edw. Ch. 293; *Fenner v. Lewis*, 10 Johns. 38; *Douglass v. Howland*, 24 Wend. 36; *H. M. Co. v. Farrington*, 16 Hun, 591; *Ayer v. Getty*, 11 N. Y. S. R. 303; *T. N. Bank v. Darragh*, 3 T. & C. 138.) When Mrs. Hard executed the mortgage as collateral to her husband's bond, she intended to assume a liability in the sum of \$10,000 for him to Mr. Bork. (*Bank of Albion v. Burns*, 46 N. Y. 170.)

PECKHAM, J. This is an action to foreclose a mortgage executed by defendants Hard upon land owned by the defendant Mrs. Hard.

The amended complaint sets forth the fact of the execution of the bond by defendant Samuel B. Hard to one Joseph Bork, on the 10th of September, 1874, for the payment of \$10,000 in four equal payments of \$2,500 on the 10th of September in each of the years 1876, 1877, 1878 and 1879, with interest semi-annually on all sums remaining from time to time unpaid. To secure such payments, the amended complaint alleged that defendants Hard executed a mortgage bearing even date with the bond, and whereby they mortgaged the land described in the amended complaint. The mortgage was duly acknowledged and certified, and it was delivered to Bork on the day of its date. On February 1, 1876, Bork duly assigned the same to plaintiff, as trustee for the city of Buffalo, and the city is the real party in interest, and the sole and absolute owner of the bond and mortgage. It is then further averred that there is due and remaining unpaid the sum of ten thousand dollars, and interest thereon from September 10, 1874, at seven per cent. Further appropriate and ordinary allegations for the foreclosure of the mortgage were set forth in the pleading.

The defendant Margaret Hard put in a separate answer, and set up in the way of an independent allegation, that she was seized on the 10th of September, 1874, and possessed in her

own right of the lands described in the amended complaint, and that on such day she executed a mortgage of the premises mentioned in the amended complaint, and delivered it under the circumstances, and upon the consideration, and for the purpose then set forth in her answer. She also therein alleged that she was, in September, 1874, informed that her husband was indebted to the firm of Lyon, Bork & Co., on account of money loaned by the firm to him, and she was requested to execute a mortgage to Joseph Bork, one of the firm, upon her land for the purpose of securing such firm against loss by reason of such loans theretofore made and thereafter to be made to her husband, and she thereupon executed a mortgage upon lands described in the amended complaint, and delivered it for such purpose. She believed the mortgage set forth in the amended complaint to be the same one thus executed and delivered. The answer further stated that the firm had, since that time, received moneys which should be applied on her husband's indebtedness to the firm, but there had been no accounting, and she denied any knowledge, etc., that the sum of ten thousand dollars was due. She then denied any knowledge or information sufficient to form a belief as to the truth of the allegations of the amended complaint, "not hereinbefore admitted, qualified or denied, and, therefore, she denies the same and each and every of such allegations." No question appears to have been raised as to the form of this denial.

The action was referred to a referee for trial, and he reported in favor of the plaintiff for foreclosure and sale of the premises to pay the full amount of ten thousand dollars, and interest at seven per cent from the execution of the mortgage.

Judgment was accordingly entered, and the same has been affirmed upon appeal at General Term of the Superior Court of the city of Buffalo, and from the judgment of affirmance the defendants Hard have appealed to this court.

Upon the trial, Samuel B. Hard was called as a witness on behalf of the defendants. It appears that his answer to the complaint also contained the allegation that the mortgage had been executed in order to secure the firm of Lyon, Bork &

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Co. for loans of money theretofore made and which might thereafter be made to the witness. Upon the trial, he testified that nothing was ever said between him and Bork (with whom the whole transaction concededly took place) that the mortgage should stand for anything he owed, nor that it was given to secure any advances subsequently to be made by either of the firms or by Bork. Hard also testified that he told Bork that he would get his (Hard's) wife to execute a mortgage for \$10,000 on a part of the creek property, and that he would give Bork his own bond, and that Bork should sell the bond and mortgage.

Here was a direct contradiction between the evidence of Mr. Hard and his sworn answer.

It would seem that this contradiction was fully understood and its serious character appreciated by the defendants and their counsel. The record shows that the defendant Mrs. Hard offered to show by her husband, Mr. Hard, the witness then on the stand, that when his and Mrs. Hard's answers were drawn Mr. Hard informed the attorney who drew them that the bond and mortgage in question were executed and delivered to Bork to be sold by him for the benefit of Mr. Hard, as absolute securities and not as securities for any amount then owing by him or for advances thereafter to be made, and the attorney advised him there was no legal difference; that the mortgagee would have the right to hold them as such security, and that such was the legal effect of the transaction, and that relying upon such advice and supposing it to be correct he and the defendant Margaret H. Hard answered the complaint as shown by their answers herein. The plaintiff objected to this evidence as immaterial, incompetent and irrelevant, and the court sustained the objection and the defendants excepted.

We think this offer should have been allowed to be proved. As the evidence stood a clear contradiction was shown between the evidence and the sworn answer of the witness, and any evidence which tended, if believed, to explain such contradiction in a manner consistent with the honesty of the witness the defendants were entitled to give.

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If the plaintiff claim that the allegation in the answer was an admission of a fact which concluded the defendant so long as it remained a part of the pleading, one objection to such claim is that it comes too late. The plaintiff had permitted the evidence to be given which showed the contradiction, and it was then too late to interpose with an objection which would preclude any explanation of the contradiction. This is upon common principles of fairness. If the plaintiff had a conclusive objection to the proof of any fact which would contradict an admission in the answer, he was bound to state it when the evidence in contradiction was offered, and he should not be permitted to acquiesce in its admission without objection, and subsequently present the objection when the witness desires to explain this contradiction. Otherwise the plaintiff obtains the benefit of the contradiction and its effect as more or less of an impeachment of the rest of the evidence of the witness, while at the same time he secures the conclusive character of the admission in the pleading. This he should not be permitted to do.

Upon examination of the so-called admission we are of the opinion that it is not of such a character as to prevent on that ground evidence of an inconsistent fact. It admits no allegation of the complaint. That pleading made no allegation as to the consideration of the bond and mortgage. It alleged the execution of the bond in the penal sum of twenty thousand dollars, with the condition for the payment of ten thousand as therein stated, and that the mortgage was executed as security for the bond.

The answer of Mrs. Hard set up as an affirmative defense the execution of the mortgage for the purpose of securing the firm of Lyon, Bork & Co. for loans already made by that firm to her husband, or which might thereafter be made to him, and then stated the further facts necessary to secure an accounting, and denied the indebtedness of ten thousand dollars. The only admission that could possibly be here claimed would consist in an admission of the execution of a mortgage upon the lands described in the amended complaint.

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It in fact is nothing but an allegation of the execution of a mortgage, coupled with and forming part of the allegation as to its consideration. An answer may contain a direct or an implied admission of some fact alleged in a complaint. The admission is implied when the fact alleged in the complaint is not denied in the answer. It is direct when the admission is made in terms. Either form of admission of an allegation contained in the complaint is conclusive upon a defendant so long as it remains in the pleading and the plaintiff can point to it as conclusive proof of the truth of his allegation. (*Paige v. Willett*, 38 N. Y. 28; *Robbins v. Codman*, 4 E. D. Smith, 315, 325.) An allegation contained in an answer setting up an affirmative defense which has no reference to and does not admit any allegation of the complaint is of an entirely different nature. Such allegation is not an admission contained in a pleading which is conclusive so long as it remains in the record. An admission which so concludes a party admits something already alleged or set forth in the pleading to which the pleading containing the admission is an answer. In this case the allegation as to the consideration of the mortgage admitted nothing as to that consideration which was set forth in the complaint, for there was no allegation therein as to the consideration, and consequently the defendant was not concluded from showing a fact which was inconsistent with his allegation of the consideration on the ground that he had admitted the consideration and could not be heard to prove one inconsistent with such admission. The plaintiff could avail himself of the allegation in the answer as a declaration by defendant, and the defendant could explain it by other evidence so far as possible.

The question whether this evidence of the consideration as testified to by Mr. Hard was not objectionable on the ground that it changed substantially the defense (Code, § 723) is not now here. No such question was raised when the evidence was given. Subsequent to that time the defendants requested the referee to give them leave to amend the answers by striking out the allegations as to the consideration of the mortgage

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and by inserting allegations in conformity to the testimony of defendant, Hard. This was objected to by the plaintiff upon the ground that such amendment would change the issues and also because the defendants had been guilty of *laches*. The court denied the motion for lack of jurisdiction, and not as discretionary. I suppose the motion was made so that the evidence already in without objection might be regarded by the referee as properly taken upon a question raised by the pleadings and in order that he should not ignore the evidence as not material to any issue raised, although coming in without objection. The defendants, of course, desired the benefit of this evidence, if there were any, and, therefore, naturally sought to have it appear as material evidence offered upon an issue raised by their answers in the action.

As there must be a new trial because of the error in refusing, under the circumstances already set forth, to allow the defendant, Hard, to explain the apparent contradiction in his evidence when compared with his answer, it is not necessary to decide whether the referee was or was not correct in his decision. The motion for leave to amend can be now made at Special Term, if defendants be so advised, before another trial is entered upon, and the court can decide the motion upon such terms as to it may appear to be just. The rules for permitting amendments to pleadings before trial so as to have them present the case as the parties desire it, are very properly quite liberal and there is no fear that the defendants will be treated with any injustice in such a matter.

It would be quite unfortunate for the parties if we should send this case back for a new trial without deciding the real question which appellants' counsel has so ingeniously argued. He says this mortgage was executed by the defendant, Mrs. Hard, as a surety for her husband's liability and her contract must be judged according to the strictest rules governing contracts of sureties. The mortgage, he says, is in terms one to Joseph Bork and on its face purports to secure the payment to him of ten thousand dollars, and it cannot be enforced as security for the payment of Mr. Hard's debt to Lyon, Bork

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& Co., or any other firm, even though Joseph Bork were a member thereof, and it can only be enforced as a security for a debt owing to Joseph Bork personally. He urges that the contract is one to answer for the debt of a third person and must be in writing and the writing must govern, even though it do not express the parol contract which in fact had been entered into. Thus, if Mrs. Hard had agreed by parol to secure by her mortgage the debts of her husband to Bork, or to any firm of which he was a member, and the mortgage was in terms to secure her husband's personal indebtedness to Bork alone, it could not, he argues, be enforced for the firm indebtedness because of the want of an agreement in writing to that effect. The principle claimed by the counsel may be correct, but it is not applicable to this case.

It is true that the indebtedness for which the land of Mrs. Hard is to be held liable is that of a third person, viz.: her husband, but her contract in regard to it is in writing and signed by her. The statute which forbids holding her liable for the debt of another, unless by virtue of her own contract in writing and signed by her, is thus complied with. Evidence of the real and actual consideration of the mortgage may always be given by parol. Either party is always at liberty to show for any purpose, except to prevent its operation as a valid deed or mortgage, that the consideration was different from that named in the instrument. (*Murray v. Smith*, 1 Duer, 412, and cases cited.) This principle is not affected because one of the parties to the instrument is a surety for some third person. Thus, in this case, it seems to me plain that parol evidence is admissible to show that the consideration for the execution of this written security for the payment of ten thousand dollars was the indebtedness then existing or subsequently to be incurred of Mr. Hard, the husband of the mortgagor, to Mr. Bork, or to any firm of which he was a member. The mortgagor must be privy to such consideration. The evidence of the real consideration does not change the liability of the party signing the mortgage. It shows the reasons for assuming the obligation and the character thereof.

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While the instrument might show a pecuniary consideration for its execution, parol evidence is admissible to show that the consideration was other than pecuniary. And this has been held not to violate the general rule that parol evidence is not admissible to contradict a writing. (Case above cited.) The same principle applies to the case of a surety. The consideration, while open to explanation, cannot be enlarged so as to enlarge the liability beyond that which the party has entered into in writing. The amount of the indebtedness of her husband for which Mrs. Hard's property described in the mortgage could be held liable, cannot in any event exceed ten thousand dollars and interest properly cast. She has only offered her land as security to that extent and she cannot be held beyond it by virtue of any parol agreement. She agreed to hold her land liable to secure the payment of ten thousand dollars in sums and at the times mentioned in the mortgage, and her land is not liable to secure the payment of any greater sum or at any other times than as she promised. Any indebtedness therefore which her land could secure must have been incurred and have become due not later than the times indicated for the payment of the moneys set out in the mortgage. Within the principle permitting parol evidence as to the consideration for which a written instrument was executed, it is entirely competent to show that the consideration upon which the defendant, Mrs. Hard, executed, the mortgage to secure the payment of ten thousand dollars was the indebtedness of her husband then existing or thereafter to be incurred in favor of Mr. Bork or in favor of any firm of which he was a member. The agreement by which Mrs. Hard answers for the debt of a third person is the written mortgage signed by her. The consideration for the written agreement may be proved by oral evidence. This consideration will be a matter for proof upon the new trial which must be had, and we will not anticipate further the questions which may possibly be raised on such new trial.

One other question will necessarily be passed upon on the new trial, and that is the question of the rate of interest. It

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arises now, and we think we should decide it. The referee gave judgment for the principal sum as set out in the mortgage, with interest at 7 per cent, up to the entry of the judgment.

The mortgage contained a provision for the payment of ten thousand dollars, as stated in the commencement of this opinion.

This is not like the agreement to pay interest on a principal sum at 7 per cent, until the principal sum is paid, such as the case of *Taylor v. Wing* (84 N. Y. 471, 477).

In the present case the amount of principle was stated, and it was agreed to be paid in installments of twenty-five hundred dollars in four annual payments, and the sums remaining from time to time unpaid were to bear interest at 7 per cent. This clearly meant that the interest on the principal sum, which, by the terms of the mortgage, was not due, was to be at 7 per cent. Thus the whole principal sum of ten thousand dollars was to be at an interest of 7 per cent from the time of the execution of the mortgage until an installment became due, and then when the installment was paid the interest on the balance remaining unpaid, but not yet due, was also to be at the same rate. If an installment were not paid when due, the contract was violated, and interest after that upon such installment could only be recovered as damages and at the rate of interest authorized by law. (*Bennett v. Bates*, 94 N. Y. 354; *O'Brien v. Young*, 95 id. 428.)

This leaves the mortgage running at 7 per cent interest upon all sums unpaid up to the time when the legal rate was reduced to 6 per cent, and from that time on at the reduced rate.

For the reasons above given the judgment should be reversed, and there must be a new trial, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

MARY CURRY, Appellant, v. THE CITY OF BUFFALO,
Respondent.

The act of 1886 (Chap. 572, Laws of 1886), requiring actions against "the mayor, aldermen and commonalty of any city" having fifty thousand inhabitants or over, for damages for personal injuries arising from its alleged negligence, to be commenced within one year after the cause of action accrued, and notice of the intention to commence such action and of the time and place at which the injuries were received, to be filed with the counsel to the corporation within six months after such cause of action shall have accrued, is not limited to a city having as its corporate name "the mayor, aldermen and commonalty," but applies to all cities of the prescribed size, and is imperative.

The commencement of the action cannot be considered as such notice; as the filing thereof is a condition precedent to its maintenance.

The whole matter of the maintenance of this class of actions is within the control of the legislature.

The fact that a city charter requires that claims for such damages shall be presented to the common council for its consideration does not excuse a noncompliance with said act of 1886; the two requirements are not inconsistent.

Where, therefore, in an action against the city of Buffalo to recover such damages, a compliance with said act of 1886 was not shown, *held*, that plaintiff was properly nonsuited; that a compliance with a provision of the city charter as it stood at the time of the commencement of the action, which was prior to its amendment in 1889 (§ 7, tit. 3, chap. 519, Laws of 1870, as amended by § 8, chap. 479, Laws of 1886), did not excuse the failure to give the notice required by said act of 1886.

Reported below, 57 Hun, 25.

(Argued June 14, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which denied a motion for a new trial and affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

The nature of the action and the material facts are stated in the opinion.

Adelbert Moot for appellant. The plaintiff is entitled to a new trial, because chapter 572 of the Laws of 1886, does not apply to Buffalo. (*M., etc., R. R. Co. v. Mayor, etc.*, 49 Hun,

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126; *Mayor, etc.*, v. *Brady*, 115 N. Y. 599; *Weiler v. Nemback*, 114 id. 39; *Renning v. City of Buffalo*, 102 id. 308; *Dawson v. City of Troy*, 49 Hun, 322.) If we assume that chapter 572 of the Laws of 1886, did apply to the city of Buffalo, it had nevertheless, been repealed by implication so far as the city is concerned by chapter 318 of the Laws of 1889.) Again, if we assume that the act of 1886 does apply to the city of Buffalo, the plaintiff is still entitled to maintain her action. (Laws of 1870, chap. 519, § 7; *Renning v. City of Buffalo*, 102 N. Y. 308; *Duff v. Mayor, etc.*, 40 N. Y. S. R. 230; *Meyer v. Mayor, etc.*, 14 Daly, 395; 12 N. Y. S. R. 674; *Mertz v. Brooklyn*, 33 N. Y. S. R. 577; 128 N. Y. 617.)

Philip Laing for respondent. Chapter 572 of the Laws of 1886 applies to the city of Buffalo. (*Mertz v. City of Brooklyn*, 33 N. Y. S. R. 577; 128 N. Y. 617; *Dawson v. City of Troy*, 17 N. Y. S. R. 560; *Enaio v. City of Brooklyn*, 25 id. 114; *Curry v. City of Buffalo*, 57 Hun, 25.) The presentation of the claim, as required by the charter of the city to the common council, and the consideration of that claim by the corporation counsel, does not comply with chapter 572 of the Laws of 1886. (Laws of 1889, chap. 318; *Renning v. City of Buffalo*, 102 N. Y. 308; *Dawson v. City of Troy*, 17 N. Y. S. R. 56; *Curry v. City of Buffalo*, 57 Hun, 25; *Babcock v. Mayor, etc.*, 56 id. 196.) The court will take judicial notice of the population of Buffalo. (*Farley v. McConnell*, 7 Lans. 428.)

EARL, Ch. J. The plaintiff brought this action to recover damages for personal injuries received by her from falling upon a sidewalk in reference to which she charged the defendant with negligence. She was nonsuited at the trial solely upon the ground that she had not complied with section 1 of chapter 572 of the Laws of 1886, passed January fourth of that year, by giving the notice there required of her intention to commence the action.

She received her injuries on the 18th day of December,

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1887, and on the twenty-ninth day of May thereafter she delivered to the city clerk and the comptroller a petition addressed to the common council in which she stated the nature of her injuries and when, where and how they were received; that they were caused by the bad condition of a sidewalk negligently left by the city out of repair and in a dangerous condition, and that her damages were \$5,000, and she prayed for an order for that sum. The presentation of her claim to the common council by her petition was a compliance with section 7, title 3, chapter 519 of the Laws of 1870, as amended by section eight, chapter 479 of the Laws of 1886, passed May twenty-seventh of that year, which section is as follows: "It (the common council) shall audit all claims against the city, but no unliquidated claims shall be received for audit unless made out in detail, specifying, if for labor or services, the time when, the place where, by whom and under whose direction and by what authority performed; if for merchandise, material, or other articles furnished, the items thereof, by whom ordered, and when and to whom delivered; and if for damages for wrong or injury, when, where and how occasioned; nor unless accompanied by an affidavit that the claim and the items and the specifications thereof are in all respects just and correct, and that no payments have been made, and that no set-offs exist except those stated. No action or proceeding to recover or enforce any such claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the common council for audit in the manner and form aforesaid. The common council, before auditing any such claim, shall refer it to the auditor. If such claim shall not be made out or verified as above required, the common council may, within thirty days after its presentation, refuse on that ground to audit it. All actions brought against the city to recover damages for personal injuries caused by negligence, shall be commenced within one year from the time of receiving the injuries." The action was commenced July 23, 1888, and after that, section 7 was again amended, and re-enacted as amended, in chapter 318 of the Laws of 1889.

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The amendment required claims for a wrong or injury to be presented within six months after the wrong or injury occurred. As the amendment was after the commencement of this action, it is in no way material to be now considered.

The purpose of section 7 was to regulate the powers and duties of the common council in the audit, allowance and payment of claims against the city, and the main features of the section, with more or less similarity, are found in the charters of many of the cities of this state. The provisions of that section are not inconsistent with the provisions of section 1, chapter 572 of the Laws of 1886, and both sections can stand together and have full operation. The provisions of section 7 are not in all city charters, and are not precisely the same in any of them, and hence section 1 was intended as a general provision applicable to all cities of the prescribed size. It is as follows :

“No action against the mayor, aldermen and commonalty of any city in this state having fifty thousand inhabitants or over, for damages for personal injuries, alleged to have been sustained by reason of the negligence of such mayor, aldermen and commonalty, or of any department, board, officer, agent or employee of said corporation, shall be maintained, unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action, and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation, or other proper law officer thereof, within six months after such cause of action shall have accrued.”

The learned counsel for the plaintiff contends that this section applies only to the city of New York, as that is the only city whose corporate name is the “mayor, aldermen and commonalty.” But it was clearly intended to apply to all cities of the prescribed size, and so it was held in *Mertz v. City of Brooklyn* (33 N. Y. St. Rep. 577), affirmed in this court in 128 N. Y. 617. The section is imperative. The action cannot be maintained unless notice of the intention to commence it, and

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of the time and place of the injury "shall have been filed with the counsel to the corporation," and a failure to file the notice furnishes a defense to the action. The filing of the notice is a condition precedent to the maintenance of the action. (*Reining v. City of Buffalo*, 102 N. Y. 308; *Mertz v. City of Brooklyn*, *supra*; *Dawson v. City of Troy*, 49 Hun, 322.)

The commencement of the action cannot be considered as a notice of intention to commence the action, because the notice must be filed before the commencement of the action, and as a condition to the maintenance thereof.

The whole matter of the maintenance of this class of actions was within the control of the legislature. It could refuse a right of action against municipalities for such injuries, and it could impose any conditions precedent to the maintenance of such actions. It could require notice of the intention to commence them to be served both upon the common council and upon the corporation counsel, and an act requiring the one notice would not be inconsistent with an act requiring the other. Here the legislature required the presentation of the claim to the common council for its action thereon, and the notice to the corporation counsel for his information and to govern and influence his official conduct. These actions against cities are numerous, and the legislature seems to have been solicitous to protect them so far as possible against unjust or excessive claims, and also against the improvident or collusive allowance of such claims by municipal officers.

The prevailing opinion in the court below contains a very satisfactory discussion of the questions involved upon this appeal, and but for the zeal of the learned counsel for the plaintiff and the alleged importance of our decision as bearing upon other pending actions, we should not have deemed it important to do more than to refer to that opinion for the grounds of our affirmance of the judgment.

Our conclusion is that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

THE SALT SPRINGS NATIONAL BANK of Syracuse, Appellant,
v. GEORGE B. SLOAN, Respondent.

It seems that one who guarantees generally the collection of a demand, thereby undertakes that it is collectible by due course of law, and only promises to pay when it is ascertained that it cannot be collected by suit, prosecuted to judgment without unnecessary delay against the principal, and execution issued thereon, and an endeavor so to collect is a condition precedent to a right of action against the guarantor.

Insolvency is no excuse for a failure to prosecute.

While in most cases the question as to what constitutes due diligence in the prosecution of such an action, where it arises upon undisputed evidence, is one of law only, if different inferences may fairly be drawn by equally intelligent and unbiased men from the evidence, it is for the jury to determine the question under proper instructions from the court.

Defendant executed a bond which recited that certain drafts had been drawn upon the firm of B. & C., which were accepted by said firm and discounted by plaintiff; also, that the said firm had made an assignment for the benefit of creditors before any of the drafts became due. The condition of the bond was that defendant would within one year from its date pay plaintiff any sum remaining unpaid on said drafts up to \$5,000, and which it, "after due diligence, shall fail to collect" within that time from the drawers or their assignee. In an action upon the bond, *held*, that the rule governing general guarantees of collection, did not apply, as due diligence might be exercised during the time limited and yet no judgment have been recovered; that while the condition required the exercise of due diligence against both assignors and assignee this, in case the assignment was valid, did not require the immediate commencement of legal proceedings against the assignee; that as long as he was proceeding with proper celerity in the execution of his trust, plaintiff was not required to take any legal action against him; that, while in case the assignment was fraudulent as against creditors, an action against the assignors and assignee might be necessary, if plaintiff examined this question with due diligence and ascertained that there were no grounds upon which to base an attack upon the assignment, and if the assignee duly performed his duties during the year, it could not be determined as matter of law that plaintiff had failed to exercise due diligence in this regard; that the fact that investigations in regard to the validity of the assignment were in progress might properly be considered upon the question as to whether due diligence was used as against the assignors; and, if it appeared that plaintiff was engaged in an investigation made in good faith and for the purpose of determining as to whether an action in tort or one upon the drafts should be brought

135	371
136	428
135	371
138	205

135	371
154	217

135	371
171	*814

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against the assignors, it could not be said as matter of law that pending such investigation due diligence was not used, but the question was one of fact for the jury.

(Argued June 15, 1892; decided October 11, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 7, 1891, which reversed a judgment in favor of plaintiff entered upon a verdict and ordered a new trial.

This action was brought upon a bond, the terms of which as well as the facts, so far as material, are stated in the opinion.

Frank H. Hiscock for appellant. Defendant's sole defense is that plaintiff has been so guilty of laches under the bond and agreement, in not using due diligence to collect its drafts of Baker & Clark, as to discharge defendant, a surety, upon said bond, conclusively and as matter of law. This defense was not established and ought not to have been sustained by the General Term; but at most defendant was only entitled, as the Circuit judge ruled, to have the jury say whether plaintiff had been so guilty of laches. (*Van Vechten v. Pearson*, 5 Paige, 512; *Miller v. Phillip*, 5 id. 573; *Roome v. Phillips*, 24 N. Y. 463; *People v. Van Rensselaer*, 8 Barb. 200; *White v. Case*, 13 Wend. 543; *Dobbin v. Bradley*, 17 id. 422; *Schmitz v. Langhaar*, 88 N. Y. 503, 507; *Burt v. Horner*, 5 Barb. 501; *Mead v. Parker*, 111 N. Y. 259, 262; *C. N. Bank v. Pratt*, 40 N. Y. S. R. 789; *Gallagher v. White*, 31 Barb. 94; *Penniman v. Hudson*, 14 id. 580-81; *Backus v. Shepherd*, 11 Wend. 631, 634; *Lamourieux v. Hewitt*, 5 id. 307, 308; *Thomas v. Woods*, 4 Cow. 180; *Tiffany v. Willis*, 30 Hun, 266; *N. Ins. Co. v. Wright*, 76 N. Y. 445; *Craig v. Parkis*, 40 id. 186.)

Elisha B. Powell for respondent. Plaintiff must stand or fall upon his case as it stood when summons was served March 17, 1888. The execution had not then been returned. (*Smith v. Aylesworth*, 40 Barb. 104.) Defendant was a guarantor, not a surety. The former is a secondary, whereas

Statement of case.

the latter is a primary obligation. In the case of a guarantor his responsibility does not begin until the performance of some act, or the fulfillment of some promise on the part of the creditors. (9 Am. & Eng. Enc. of Law, 431; 18 Am. L. R. [N. S.] 751; 10 id. 431.) Defendant was a special guarantor of collection, not of payment. (*McMurray v. Noyes*, 72 N. Y. 523; *E. N. Bank v. Kaufman*, 93 id. 273.) In such a guaranty it is a condition precedent that the creditor shall diligently endeavor to collect the amount of the principal debtor by exhausting the ordinary legal remedies for that purpose, and a failure so to do works a discharge of the guarantor. (*Vanderbilt v. Schreyer*, 91 N. Y. 398; *Tiffany v. Willis*, 30 Hun, 266; Brandt on Suretyship, chap. 3; DeColyar on Guarantees, 190-197; *S. S. N. Bank v. Sloan*, 32 N. Y. S. R. 653.) The rights of the plaintiff under the bond in question are to be most strictly construed, and the liability of defendant limited to the exact extent named in the bond. (*Wright v. Johnson*, 8 Wend. 512, 516; *Kingsbury v. Westfall*, 61 N. Y. 360; *Creeghino v. Hammer*, 60 Cal. 235; *E. N. Bank v. Kaufman*, 93 N. Y. 281; *Birkhead v. Brown*, 5 Hill, 635; *Jones v. Ashford*, 79 N. C. 172; *Barnes v. Barrow*, 61 N. Y. 39; 93 id. 288; *McCluskey v. Cromwell*, 11 id. 598; *Rindge v. Judson*, 24 id. 64; *Schwartz v. Hyman*, 107 id. 565; *People v. Chalmers*, 60 id. 158.) Plaintiff failed to perform the exact conditions precedent, and therefore failed to bind defendant under his bond, in that it did not proceed with due diligence against the principal debtor. (Brandt on Suretyship, § 84, 86; *Markley v. Riggs*, 19 Johns. 69; *Eddy v. Stanton*, 21 Wend. 255; *Bd. Suprs. v. Otis*, 62 N. Y. 94; *Carr v. Sterling*, 114 id. 564; *Voorhist v. Atlas*, 29 Iowa, 49; *Kils v. Tift*, 1 Cow. 98; *Mookley v. Johnson*, 19 Johns. 69; *McMurray v. Noyes*, 72 N. Y. 525; *Mosier v. Waful*, 56 Barb. 80; *Tolles v. Adce*, 91 N. Y. 572; *Mead v. Parker*, 111 id. 262.) Plaintiff failed to perform the exact conditions precedent, and therefore failed to bind defendant under his bond in that he voluntarily granted ninety-nine days more time to the principal debtors than they were by due process of

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law entitled to. (*Miller v. Stewart*, 9 Wheat. 680; *People v. Backus*, 117 N. Y. 201.) Plaintiff failed to perform the exact conditions precedent, and therefore failed to bind defendant under his bond, in that it failed to perform the conditions precedent within the time limited in the bond. (*Craig v. Parkis*, 40 N. Y. 181; *Schmitz v. Langhaar*, 88 id. 506; *N. Ins. Co. v. Wright*, 76 id. 445; *Ralph v. Eldridge*, 34 N. Y. S. R. 191.) The fact that the principal debtors, Baker and Clark, were notoriously insolvent, did not relieve the plaintiff from the performance of its full duty with relation to the condition precedent. (*Craig v. Parkis*, 40 N. Y. 181; *N. Ins. Co. v. Wright*, 76 id. 445; *Toles v. Ades*, 91 id. 572.) The trial court erred in refusing to grant defendant's motion for a nonsuit at the close of plaintiff's case upon the grounds stated, and the General Term's decision reversing the judgment should be affirmed. (*Schmitz v. Langhaar*, 88 N. Y. 506; *N. Ins. Co. v. Wright*, 76 id. 488; *Craig v. Parkis*, 40 id. 181; *McMurray v. Noyes*, 72 id. 525; *Burt v. Homer*, 5 Barb. 501; *Tiffany v. Willis*, 30 Hun, 266, 263; *Mead v. Parker*, 111 N. Y. 262; *S. S. N. Bank v. Sloan*, 39 Hun, 772; *Schwartz v. Hyman*, 107 N. Y. 562.) If the question properly belonged to the jury the trial court erred in its charge to the injury of the defendant, and the reversal of judgment ordered by the General Term should be affirmed. (*Craig v. Parkis*, 40 N. Y. 181; *Newcomb v. Hall*, 90 id. 331; *Miller v. Stewart*, 9 Wheat. 680; *Cady v. Sheldon*, 38 Barb. 103; *People v. Nelson*, 13 Wend. 164; *Foster v. People*, 50 N. Y. 601.)

PECKHAM, J. This action was tried at the Onondaga Circuit before a jury. The bond upon which the suit was brought was executed by the defendant February 19, 1887. For some time prior to that date there had been a firm doing business at Oswego under the name of Austin & Co., and such firm had at that time been insolvent for some months. There was another firm doing business in the city of New York under the firm name of Baker & Clark, which firm, some months

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prior to the above date, had also become insolvent, and had made an assignment to an assignee for the benefit of creditors. The firm of Austin & Co. had drawn drafts to the amount of over \$10,000 upon the firm of Baker & Clark, which firm had duly accepted them, and the drafts had been discounted for the New York firm by the plaintiff. They had all matured and been dishonored prior to the execution of the bond in suit, and the plaintiff still held and owned them. On the 19th of February, 1887, the defendant executed the bond, and at the same time, and as part of the same transaction, the plaintiff, by its president, executed an agreement in writing and delivered it to the defendant.

The bond recited the drawing of the drafts, six in number, giving the names of their makers and acceptors, dates and amounts, and also stated that Baker & Clark had made an assignment for the benefit of their creditors before any of the drafts became due, and had preferred plaintiff in Class "B" of creditors for the amount then owing on the drafts, and being about \$7,000, and that not one of the drafts had been paid. The bond then continued with this language:

"Now, therefore, the condition of this obligation is such that if the above bounden, George B. Sloan, *shall within one year from the date hereof pay the said Salt Springs National Bank of Syracuse any deficiency up to the said sum of \$5,000 remaining unpaid to said bank on said drafts, and which the said The Salt Springs National Bank of Syracuse, after due diligence, shall fail to collect within the time above limited, from the said Baker & Clark, or either of them, or from the said Clarence F. Birdseye, as assignee aforesaid or otherwise*, then this obligation to become void, otherwise to remain in full force and virtue."

The agreement made on the part of the plaintiff recited that: "Whereas, The Salt Springs National Bank of Syracuse has this day received from George B. Sloan, of the city of Oswego, N. Y., his bond for the sum of \$5,000, dated February 19th, 1887, upon the following terms and conditions and the terms and con-

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ditions in said bond set out, to wit: *Said bank shall use due diligence to collect the six drafts named in said bond from Clarence F. Birdseye, of New York city, as assignee of the Baker & Clark named in said bond, or from Baker & Clark, and out of the moneys obtained from said assignee,"* the bank was to apply the same to the payment of the drafts, and if any surplus moneys had been paid by Sloan they were to be returned him by the bank.

It also appeared in evidence that before the first of the drafts mentioned in the bond had become due the drawers had "got into financial difficulties and transferred their property." The first draft which became due was placed in the hands of the attorney for the plaintiff and judgment against the drawers was recovered, and supplementary proceedings had been instituted against them and some negotiations had been entered upon for the giving of security by the drawers. It was at this stage of the matter that the bond and agreement above referred to were executed.

The understanding between the parties seems to have been that the plaintiff was to take no further proceedings against Austin & Co., but should go on and see what could be collected from the New York people.

The amount of the drafts not having been collected from Baker & Clark or their assignee, within the year, the plaintiff commenced this action against defendant and sought to recover the \$5,000 which it alleged he was liable for by reason of the execution of the bond. The defendant set up in his answer as a defense that the plaintiff had not performed the condition precedent to a liability on his part on the bond, and he alleged that it had failed to proceed with due diligence to collect the amount due on the drafts from Baker & Clark, or either of them, or from their assignee.

Upon the trial the sole substantial issue was whether the plaintiff had or had not used due diligence in its prosecution of the acceptors or their assignee. Evidence was given as to what it had done and the time and manner of doing it, and some evidence was given on the part of the defendant. The

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learned trial judge submitted the question as to the due diligence of the plaintiff to the jury and a verdict for the plaintiff was rendered by it.

The General Term has held that the evidence in the case was undisputed and that it raised a question of law only, and upon that question it held that the plaintiff had not prosecuted its attempt to collect with due diligence and, therefore, was not entitled to recover and it reversed the judgment and granted a new trial and from the order granting a new trial the plaintiff has appealed here.

The general rule in regard to one who becomes the guarantor of the collection of a demand is that in so doing he undertakes that the claim is collectible by due course of law, and the guarantor only promises to pay when it is ascertained that it cannot be collected by suit prosecuted to judgment and execution against the principal and the endeavor to so collect is a condition precedent to a right of action against the guarantor. And the fact of insolvency is no excuse for the failure to prosecute. (*Craig v. Parkis*, 40 N. Y. 181: *Northern Ins. Co. v. Wright*, 76 id. 445.)

The judgment must have been recovered and the execution issued thereon must have been returned unsatisfied in whole or in part before any liability is fastened upon the guarantor. And this judgment must have been recovered without unnecessary delay.

The guaranty in question is peculiar in its language. At the end of the year the guarantor promised to pay any deficiency up to the amount of \$5,000 remaining unpaid on the drafts after due diligence had been exercised by the bank to collect their amount within the time limited. It is plain that due diligence might be exercised in such case during that time and yet no judgment have been recovered, and, of course, no execution issued or returned unsatisfied. If it had been thus exercised the liability of the guarantor would attach without the recovery of such judgment. In this respect there is a distinction between the guaranty contained in this bond and that of a general guaranty of collection.

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There is the further difference that the guarantor promises to pay the deficiency up to the stated amount which the plaintiff fails to collect within the year (after due diligence) from Baker & Clark, or either of them, *or from their assignee*. It was understood that Baker & Clark had made an assignment for the benefit of their creditors, and if the assignment were not fraudulent it was, of course, known that the property of Baker & Clark had become the property of the assignee as trustee and for the purpose only of executing the provisions of that instrument. In that case the only recourse the plaintiff could have against the assignee would be to see to it that he faithfully and expeditiously carried out the directions contained in the assignment. This the assignee might and presumptively would do without any resort to compulsory process on the part of the plaintiff or any other party.

The due diligence that was required of the plaintiff did not therefore render it necessary that legal proceedings should at once be commenced against the assignee. If the latter were proceeding with proper celerity in the execution of his trust, and assuming the validity of the assignment, there was nothing for the plaintiff to do of a legal nature as against him. If, however, the assignment were invalid and had been made for the purpose of hindering and delaying creditors, then an action against the assignee as well as against the assignors for the purpose of setting aside the assignment might be necessary. In order to determine the question of the validity or the invalidity of the assignment, knowledge of the facts which caused its execution and some evidence of the motives accompanying it would obviously be necessary.

If plaintiff entered upon and prosecuted the examination of this question with due diligence and discovered there were no grounds upon which to base an attack upon the good faith and validity of the assignment, and if the assignee duly performed his duties under the assignment while the year lasted, it would seem that under such facts it could not be determined as matter of law that the plaintiff had not done all that could be expected of it, or that due diligence required

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an action against the assignee to fulfill the conditions of the bond in question. The duty to use due diligence in attempting to collect from Baker & Clark was also incumbent upon the plaintiff. It was not an alternative duty which existed only in case the assignee were not proceeded against. The condition of the bond called, as I think, for the exercise of due diligence as against both, but the fact (if it were a fact) that examinations and investigations regarding the validity of the assignment itself were in progress, might properly be taken into consideration upon the question whether due diligence was being used in reference to Baker & Clark.

Again, it might, under some circumstances, be quite an important question to determine as to the character of the legal proceedings to be taken against the principals. Should such proceedings be the simple action upon the drafts as upon instruments for the payment of money only, or should the action be one in tort as arising out of a fraudulent creation of the debt and thus give to the plaintiff the right to arrest on mesne process and to take the person upon the judgment to be obtained? The answer would depend upon the facts to be learned, and if there were suspicious circumstances which might fairly justify the resort to a more prolonged investigation made in good faith and for the honest purpose of obtaining information upon which to act, it could not be said as a matter of law that in such case and pending the investigation due diligence was not exercised in attempting to collect the amount of the drafts by action.

With this review of the situation, and of the meaning of the bond in suit, it is proper in a very general way to advert to the evidence given on the trial on the part of plaintiff as to what the plaintiff actually did in the way of using due diligence to collect the amount of these drafts.

Almost immediately after the execution of the bond the supplementary proceedings against Austin & Co., which had been commenced in Oswego, were resumed for the purpose of obtaining from them, and in a manner which would not appear to be voluntary, certain letters in their possession which

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it was thought might be of importance upon the proceedings which might be commenced against Baker & Clark in New York, and under the cover of these proceedings the attorney for the plaintiff obtained the letters. It is to be gathered there was some importance attached to them relative to the question of the liability of Baker & Clark as for a fraudulent debt in obtaining the discount of the drafts by the plaintiff. Then the attorney for the plaintiff went to New York and entered upon what he claimed was a most thorough investigation of all the facts attending the execution of the assignment for the purpose of discovering, if possible, some means of attacking its *bona fides*. He went to different creditors, put himself in communication with their attorneys to ascertain if they knew of any facts which would aid in such an attack, and in brief he did, as he claims, everything that one could be expected to do who, acting in good faith, was endeavoring to find out if any facts existed which would justify an attack upon the assignment, or an action of tort against the acceptors of the drafts. Finally he became convinced there was no chance of success in such an endeavor. He also endeavored to find if there were any property of the firm which had not been turned over to the assignee, but did not succeed in finding any. All these investigations took some time before it was finally determined that the assignment could not be successfully attacked. In the meantime, and within a week from the signing of the bond, the attorney for plaintiff commenced to investigate the whereabouts of Baker, one of the firm of Baker & Clark, and the evidence is quite minute as to what he did towards finding Baker for the purpose of serving process upon him. Mr. Baker was in Brooklyn but a very short time after the execution of the bond, and it was claimed he was endeavoring to avoid the service of process. He soon left the state and did not return until the middle of August. The plaintiff did not succeed in serving him before he left the state, and the defendant charges that no fair effort was made, and that from plaintiff's own showing service could have been made on Baker frequently while he was within the state.

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No service of process was made on Clark, the other member of the firm, until after Baker's return and some time in September, although he could have been served at any time during the period. The plaintiff says the reason for the omission was that Clark could be served any time, and if served during Baker's absence it was feared the latter might not return, and it was not thought wise to sue Clark separately.

Negotiations were also pending by which it was sought to obtain some security from a brother of Baker, and finally the brother, who was a preferred creditor of Baker & Clark of the first class, assigned the balance due him under the assignment as security for the payment of the drafts, or some portion thereof. It was feared these negotiations would be broken off if suit were commenced against Clark while Baker was away, and that in such case Baker would remain away. The defendant charges these negotiations with Baker were only for the payment of the amount over the \$5,000 claimed from defendant, and that there was no good faith in the matter of these negotiations, or in the excuse for the alleged failure to press with due diligence the case against Baker & Clark.

Process was finally served on Baker August 27, 1887, he having returned to the state on the fifteenth of that month, and on Clark on the seventh of September following.

They appeared by attorney, and under a threat on the part of the latter to put in an answer unless time for an investigation into the matter was given, the attorney for plaintiff gave various extensions of time to answer, aggregating some ninety odd days, when a default occurred and judgment was entered January 4, 1888, and a transcript filed in New York county January 5, 1888. After the date of the service of the process on Baker & Clark, the first Circuit held in Onondaga was appointed for the fourth Monday, the 26th of September, 1887. An answer would have prevented the case going on the calendar at that Circuit. The next Circuit was held in that county January 9, 1888. Before that date judgment had been obtained. It was claimed by the plaintiff that by the course pursued, which it is urged was guided to some extent by the

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threat of Baker & Clark's attorney to put in an answer and defend at any rate, if time were not given, the extensions of time actually given operated to plaintiff's advantage by finally enabling it to obtain judgment at an earlier day than it would have been enabled to do if the extensions had been refused and the defendants in that action driven to the serving of an answer. The defendant here claims the extensions were wholly voluntary, totally unnecessary, not given under a *bona fide* effort to prosecute with due diligence, and hence they constituted an inexcusable delay in prosecuting the action and formed a defense to this action on the bond. After the entry of the judgment, and the filing of a transcript thereof in New York county, there was a delay of over a month in the issuing of an execution thereon. The attorney for the plaintiff swore he intended that an execution to the sheriff of New York should accompany the transcript, and he supposed that it did, but in fact it did not, and in fact it was not issued for more than a month. The attorney says he can only explain the omission by a mistake or his absence from home during the time. No claim is made that the defendants Baker & Clark had any property which might have been reached by an execution if one had been issued at once upon the entry of the judgment, and there is no fact found in the evidence which would lend any color to the suspicion that the assignment was not a *bona fide* one which transferred all the property of Baker & Clark to the assignee in trust. It also appears that the plaintiff was in the second class of preferred creditors in that assignment, and that there was not enough property to pay in full the creditors in the first class, and it is not charged that the assignee was guilty of any want of diligence in any matter pertaining to his trust. This in substance is the case as it appeared for the plaintiff upon the trial, and it is this case which the learned General Term holds presents a question of law.

It is undoubtedly true that in many, perhaps in most cases, the question of what constitutes due diligence, where it arises upon undisputed evidence, is one of law only. What shall constitute a reasonable time in which to do an act is also gen-

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erally held to be a question of law. So is the question of what constitutes probable cause in an action for a malicious prosecution. So also is the question of negligence in certain contingencies. In none of these instances is there, however, an unyielding rule that upon undisputed evidence the question is universally one of law.

It depends frequently upon the character of the evidence itself, whether it is of such a nature that but one inference could be drawn from it by reasonable and intelligent men.

In such a case as this for instance, the due diligence of the plaintiff is not a fact that could be testified to directly and in terms.

A witness for the plaintiff would not be permitted to swear that due diligence was observed in the prosecution of Baker & Clark. In order to prove due diligence all the material existing facts surrounding the case should be shown and a statement in detail of all the things actually done in the way of prosecuting the matter would have to be proven, and then from all these things thus proved the resultant fact of due diligence, or its absence, would have to be found either by the court or a jury. If this resultant fact to be found from all the evidence in the case, uncontradicted though that evidence may be, were of so doubtful a nature that different and equally intelligent and unbiased men might fairly differ in opinion as to its character, then the jury, under proper instructions from the court, should examine the evidence and find the fact which is properly to be inferred therefrom.

It was at one time thought that where the evidence was uncontradicted or undisputed, the question of negligence was one of law only, but that claim has long since been abandoned. There may be cases, of course, where the evidence being undisputed a clear question of law only arises and the court thereupon decides that no negligence is shown, or the reverse. If the uncontradicted evidence show a case where different inferences might be drawn from undisputed facts as to the existence or nonexistence of negligence, it has been the law for many years that such inferences are to be drawn by the

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jury under proper instructions from the court. (*Hart v. Hudson R. Bridge Co.*, 80 N. Y. 622.)

The same may be said of the want of probable cause in actions for malicious prosecution. Generally it is a question of law, yet frequently upon undisputed evidence it is made a mixed question of law and fact. The jury draws the inferences, if they might fairly be the subject of difference in different minds of equal intelligence, and the court gives the proper instructions to the jury. This principle was thus asserted in the case of *Mead v. Parker* (111 N. Y. 259), although perhaps it was not directly and necessarily involved in the point actually there decided. See also *Sullivan v. N. Y. & Rosendale Cement Co.*, 119 N. Y. 348; *Reilly v. Dodge*, 131 id. 153, 159.) The principle is, however, correct.

If the undisputed evidence show a state of facts from which but one inference could properly and justly be drawn by any fair and intelligent man, then the question of due diligence is one for the court alone.

Upon the evidence already detailed in this case we are clearly of the opinion that the question presented was one for the jury under proper instructions from the court. The court charged that the plaintiff was bound to use due diligence up to the time it commenced this action, although beyond the period of the year specified in the bond. The jury was charged with the duty of considering the question whether upon all the evidence in the case the plaintiff used due diligence in prosecuting Baker & Clark, and also against the assigned estate. The court also said to the jury that if the extensions of time to answer were given voluntarily, of which they were to judge upon the evidence, then more time was given to the defendants than due diligence entitled them to.

The defendant here makes several claims as proved by this evidence.

He urges first that the failure to serve Baker with process before he left the state in March or April, 1887, was a failure to exercise due diligence and that the efforts to serve him as stated on the part of the plaintiff, were not made in good

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faith and were not under all the circumstances sufficiently persistent to show due diligence. This question of good faith was peculiarly proper upon the evidence for a jury to decide. It is also claimed the excuse for the failure to serve Clark until after Baker had been served was unjustifiable. The evidence upon that subject, though not disputed, leaves a question as to the *bona fides* of the excuse actually given, whether the fact stated was really and in good faith the motive and cause of plaintiff's conduct. This also upon the evidence was a question for the jury. The negotiations for security from Baker's brother are also attacked as not having been made in good faith and for the purpose of collecting as much as possible upon these drafts, and consequently it is urged that they furnish no excuse or justification for failing to serve Clark even though Baker was out of the state. The excuse offered for this failure has been stated above, and here again we think it was a fair question for the jury to say whether the excuse was a *bona fide* one and had really caused the delay spoken of. Other questions of good faith on the part of the plaintiff arose in the progress of the case. Enough has been said to show that the question whether the plaintiff acted with due diligence depended upon the construction to be given quite a number of different acts of the plaintiff and upon the motives which accompanied them; whether those acts were in reality performed in good faith and for the purpose of honestly fulfilling the duty owed by plaintiff to defendant, or were simply actions intended as a mere cover or blind to excuse the failure to prosecute, while at the same time affording ground for the pretense that the plaintiff had done all it could to collect the drafts from the assignee of the estate or from the firm of Baker & Clark. These matters were peculiarly of a nature for a jury to decide upon and it would appear that the question was submitted to that tribunal with great fairness by the learned trial judge and upon proper instructions as to the law governing the case.

One other objection to this recovery is made by the defendant. The plaintiff failed to prosecute Baker & Clark by action

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upon one of the six drafts mentioned in the bond. It commenced its action and obtained its judgment upon the remaining five only. The defendant claims the prosecution should have been upon all of them and that the failure constitutes a defense to the bond.

The draft upon which no suit was brought was put in evidence and the plaintiff maintained it was paid, although it was not so marked. The court charged it might be considered a due prosecution of the draft when the plaintiff acknowledged that it got the money on it and made no demand upon the defendant therefor.

The plaintiff in truth made no claim for or on account of that draft and we think the trial court committed no error in the disposition of the case with regard to it.

We have looked through the case with respect to the exceptions taken upon the decisions of the court as to the admission or rejection of evidence and we are unable to see that any error to the prejudice of the defendant occurred in their disposition.

Upon the whole case we think the court properly left the question of due diligence to the jury.

The order of the General Term granting a new trial should therefore be reversed and the judgment entered upon the verdict of the jury should be affirmed, with costs.

All concur, except ANDREWS, J., not voting.

Order reversed and judgment affirmed.

Statement of case.

PLINY T. SEXTON, as Survivor, etc., Appellant, v. HENRY
BREESE, Respondent.

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The title of the mortgagor of real estate is not changed by the mortgage, and although the mortgagee goes into possession by a surrender from the mortgagor, the fee still remains in the latter.

Although a growing crop of grain is in a sense a part of the real estate, it possesses characteristics of a chattel; it is salable and transferable as personal property.

The owner of a farm, upon which was a mortgage held by plaintiff, sold to defendant a crop of wheat thereon, the bill of sale giving to him the right to secure and harvest the crop. Subsequently said owner executed to plaintiff a written instrument, wherein he authorized the latter to take possession of the farm, rent the same and apply the proceeds on the mortgage. Defendant went upon the farm to cut the wheat, but was prevented from so doing by plaintiff, who harvested it, but defendant entered and carried it away. In an action of replevin, *held*, that conceding plaintiff to be in the position of a mortgagee in possession, still defendant, as purchaser, owned the crop of wheat and had the right of ingress to gather and carry it away; and so, that the action was not maintainable.

Reported below, 57 Hun, 1.

(Submitted June 15, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 5, 1890, which denied a motion for a new trial and ordered judgment for defendant on a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles McLouth for appellant. Plaintiff claims that the indisputable facts show him entitled to and actually in possession of the wheat in question, adversely to defendant's claim thereto, at the time when the latter wrongfully took same. (*Sohler v. Singer*, 44 Barb. 614; *Winslow v. McCall*, 32 id. 241; *Shepard v. Philbrick*, 2 Den. 174; *Batterman v. Albright*, 122 N. Y. 484; *Jewett v. Keenholts*, 16 Barb. 196; *Gardner v. Finley*, 19 id. 321; *Sherman v. Willett*, 42 N. Y. 146; *Gibson v. A. L. & T. Co.*, 58 Hun, 443; *Lapham v.*

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Griffith, 35 Barb. 59, 60; *Phyfe v. Riley*, 15 Wend. 248; *Hubbell v. Sibley*, 50 N. Y. 472; *Ten Eyck v. Craig*, 62 id. 406; *Hays v. Dickinson*, 9 Hun, 277; *Cook v. Cooper*, L. R. [7 App.] 272; *M. A. Church v. O. S. Church*, 9 J. & S. 369; 73 N. Y. 82-94.) The court below should have granted plaintiff's request to direct a verdict in his favor. (*Shapley v. Abbott*, 42 N. Y. 443; *Hunt v. Moultrie*, 1 Bosw. 532; *Payne v. Burnham*, 62 N. Y. 69; *Iselin v. Henlein*, 16 Abb. [N. C.] 73; *Reynolds v. Lounsbury*, 6 Hill, 536; *Mayenborg v. Haynes*, 50 N. Y. 675; *Maguire v. Selden*, 103 id. 642.)

M. Hopkins for respondent. If, as plaintiff claims, Cuyler and Sexton made their note and placed it, instead of the mortgage, in the bank, this was clearly a device of theirs to evade the National Banking Act (§§ 8, 28), which prohibits national banks from loaning money upon real estate security, and was void. (*In re McGraw*, 111 N. Y. 105.) If the First National Bank of Palmyra took and held this mortgage to secure these future advances to Mumford, the mortgage is void. (*Crocker v. Whitney*, 71 N. Y. 161; 79 id. 437.) The mortgage being void, defendant may very properly take advantage of its invalidity, particularly as this void instrument is the means whereby plaintiff seeks to acquire title to this wheat. (*In re McGraw*, 111 N. Y. 105.) Upon the assumption that plaintiffs' mortgage was a valid and subsisting lien upon these premises, defendant took title to the wheat, subject only to the contingency that the same would be wiped out by a foreclosure after forfeiture before it was harvested. (*Sherman v. Willets*, 42 N. Y. 150; *Trumm v. Marsh*, 54 id. 599; *Stall v. Wilbur*, 77 id. 161; *Harris v. Frink*, 49 id. 27; *Green v. Armstrong*, 1 Dem. 554; *Austin v. Sawyer*, 9 Cow. 40; *Frank v. Harrington*, 36 Barb. 415, 420; *Jones v. Flint*, 10 Ad. & El. 753, 759; *Stewart v. Dorghey*, 9 John. 112.) Plaintiff's entry into possession of the mortgaged premises, if any subsequent to the sale of the wheat to defendant, is not equivalent to a foreclosure and does not give him the right to question the sale or reclaim the crop sold. He has no other or greater

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rights in respect to this wheat than the vendor, Mumford, at the time of his, plaintiff's, alleged entry. (Jones on Mort., §§ 670, 697, 771, 772; *Astor v. Tanner*, 11 Paige, 436, 437; *Mitchell v. Bartlett*, 52 Barb. 319, 326, 327; *Parker v. R. & S. R. R. Co.*, 17 N. Y. 298.) By reason of his rulings upon the trial the question submitted by the trial judge to the jury was the only question of fact the case presented for the jury to pass upon, and the charge of the judge in respect to this question is accordant with the law of this state. Plaintiff had the power to exempt any portion of the property from his entry. (*Sherman v. Willett*, 42 N. Y. 146; *S. & Co. v. Edwards*, 35 id. 279.)

GRAY, J. The action was in replevin for the purpose of recovering a crop of wheat which had been harvested from a farm, and the question presented relates to the respective rights thereto of the plaintiff, as mortgagee of the farm, and claiming to be in possession as such, and of the defendant, as the vendee of the growing crop, under a bill of sale from the owner and mortgagor. The mortgage was executed and delivered in 1875 to the plaintiff's firm, as a collateral security for any liabilities which the mortgagor might thereafter incur, and was to become due, by its terms, one month after demand. In February, 1879, the owner of the farm left the place; allowing the defendant, to whom he was in debt for moneys borrowed, to have possession of the farm and to work it for himself.

In the following month he sold to the defendant the standing or growing crop of wheat in question, and which he had himself sowed in the previous autumn; the bill of sale giving to defendant the right to secure and harvest the crop. In the following month of April, the owner of the farm executed and delivered a certain instrument to the plaintiff, wherein he authorized him "to take possession of my farm at Macedon and to rent same * * * and after paying all expenses to apply the net income upon my indebtedness to him." He entered upon the farm under this instrument, and it is his claim that thereby he became mortgagee in possession. When

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the wheat had ripened the defendant went upon the farm to cut it, but was prevented from doing so by the plaintiff, who proceeded to harvest it for himself. Before, however, the plaintiff had gotten in the wheat from the field, the defendant entered, early in the morning, and carried it off. This action then resulted.

I do not think that the instrument, under which the plaintiff entered into the possession of this farm, had the effect of making the possession that of the mortgagee, as that is technically understood. Its very terms seem to preclude that idea; for the possession, which the plaintiff was authorized to take, was qualified and limited to the exercise and enjoyment of certain prescribed acts; namely, to rent it and to apply the net income upon the indebtedness. The mortgage had not become due, inasmuch as there had been no demand for the payment of any indebtedness accrued and to be secured by it, or, at any rate, such a demand as the nature of this mortgage required. But I do not think it very important to our decision whether we hold that the possession was technically that of mortgagee, or one authorized by and assumed under the writing referred to. Although, if that question should be deemed essential, I should regard the possession taken by plaintiff through this instrument of April, 1879, as not equivalent to a possession by surrender of the land from the mortgagor. In this State it must be regarded as settled by the cases that the title of the mortgagor to the land is not changed by the mortgage. It remains as before; while the mortgagee has in the mortgage a security for the mortgagor's debt, which is impressed upon the lands described and incumbers them with the burden of the debt.

It must also be regarded as settled that even if the mortgagee goes into possession of the premises by a surrender of them from the mortgagor, the legal title or fee still remains in the mortgagor; and what the mortgagee thereby acquires is the possession of the pledged property. He holds it then for the purpose of paying off the debt, with which it was incumbered, but takes no estate in the land. (*Kortright v.*

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Cady, 21 N. Y. 343; *Trimm v. Marsh*, 54 id. 599.) In *Trimm v. Marsh*, the question of the effect upon the title, where the mortgagee acquires the possession of the land, was quite fully discussed upon theory and in the light of earlier cases, and the decision should be considered as settling and, as I think, quite in accordance with the reason of the thing, that a mortgagee, who merely is let into the possession of the mortgaged land, does not acquire the legal title.

If we assume that the plaintiff was in possession of the land as by an actual surrender from the mortgagor, his rights in its use were subject to the previous disposition made of the growing crop of grain by the owner of the land. He had planted the crop and it was perfectly competent for him to dispose of it while he held the title to the land. Though, in a sense, a growing crop of grain is a part of the real estate, it, nevertheless, possesses the characteristics of a chattel and is salable and transferable as other personal property is, and may be taken upon execution and sold in discharge of a judgment debt. (*Whipple v. Foot*, 2 Johns. 422; *Stall v. Wilbur*, 77 N. Y. 158.)

The relation which growing crops bear to the land has been frequently the subject of discussion in the courts and is in some respects a peculiar one. They pass to the grantee in a conveyance of the land as appertaining thereto. (*Wintermute v. Light*, 46 Barb. 283; *Stall v. Wilbur*, *supra*.) And equally upon a sale in foreclosure of a mortgage, the purchaser would acquire with the title to the land the right to the growing crops. (*Shepard v. Philbrick*, 2 Denio, 174.)

In England growing crops, which were *fructus industriales*; that is to say, annual products of a tillage of the earth by the labor of the occupier, have been regarded as chattels, quite independent of the land. Any supposed confusion in the decisions, with respect to their relation to the land, arose rather in the consideration of the question of the validity of their transfer by parol, under the Statute of Frauds; than in any difference in opinion as to their being chattels.

Distinctions, of course, were made between growing crops of grain and trees, the fruits of trees and perennial plants.

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(*Crosby v. Wadsworth*, 6 East, 602; *Evans v. Roberts*, 5 B. & C. 829; *Jones v. Flint*, 10 A. & E. 753; *Rodwell v. Phillips*, 9 M. & W. 501.)

Those views, as to the legal relation of these annual products of the land to the land itself, obtained and were held here in the early cases of *Whipple v. Foot* (*supra*); *Shepard v. Philbrick* (*supra*); *Green v. Armstrong* (1 Denio, 550), and more recently in the case of *Stall v. Wilbur*, to which I have referred. Probably the rights of a third person to the growing crops of grain, under a contract of purchase with the owner, would be annulled by the sale upon the foreclosure of a mortgage of the land, according to the decisions in *Shepard v. Philbrick* (*supra*), and *Lane v. King* (8 Wend. 584), for then the transfer of the title to the mortgaged premises would carry with it to the purchaser a paramount title to the growing crop. But, in the present case, that proposition is not before us and the title of the mortgagor to the mortgaged land was not divested or transferred to the mortgagee with the possession. The defendant, Breese, was the purchaser of the growing crop of wheat and, upon its becoming ripe for harvesting, as well under the express authority of his bill of sale, as without it, impliedly, he had the right of ingress to gather and to carry it away. (*Stewart v. Doughty*, 9 Johns. 108.)

His vendor's legal title to the land had not ceased and the fact of the mere possession having changed to another person, was not sufficient to annul Breese's contract, and, was, consequently, inoperative upon his right to enter and carry away the ripened wheat.

We think the conclusion reached by the General Term that the defendant was entitled to the verdict at Circuit was correct and, as no other error appears from the record, their order denying plaintiff's motion for a new trial upon his exceptions, and directing judgment on the verdict, should be affirmed, with costs.

All concur.

Order affirmed and judgment accordingly.

Statement of case.

HUDSON RIVER TELEPHONE COMPANY, Appellant, v. WATER-
VLIET TURNPIKE AND RAILWAY COMPANY, Respondent.

The immunity from liability of a corporation, exercising a power or privilege conferred by law for the public benefit, for a private injury, where the damage sustained is the result of the proper exercise of the power or privilege, does not extend to acts which are *ultra vires*, or to those which are equivalent to a confiscation or condemnation of property rights, unless provision is made for due compensation.

Under and by the act of 1862 (Chap. 233, Laws of 1862), authorizing the W. T. Co. to construct a street railroad, and operate the same by any mechanical or other power except steam, the company was authorized, upon obtaining the consent of the proper municipal authorities, to adopt electricity as a motive power.

Said act may not be limited to the methods of operating such railroads known and in actual use at the time of its passage, nor is the company irrevocably bound by the choice of motive power first made after the passage of the act.

So also, under the power given by that act to the common council of the city of Albany to impose such restrictions as, in its judgment the interests of the public require, that body is not bound by the limitations first imposed, but the authority is coincident with the company's right of selection.

Accordingly *held*, that said company having obtained the consent of the common council of the city of Albany, was authorized to adopt and use what is known as the single-trolley system of electrical propulsion, it appearing and having been found that it is the best system thus far devised, and is not prejudicial to public health, or dangerous.

People ex rel. v. Newton (112 N. Y. 396) distinguished.

Also *held*, that said company was not subject to the provision of the Street Surface Railroad Act (§ 12, chap. 252, Laws of 1884, as amended by chap. 531, Laws of 1889), requiring the approval of the railroad commissioners and the consent of the owners of one-half the property upon the streets, as it came within the saving clause in said act (§ 18), which declares that the act shall not interfere with, repeal or invalidate any rights theretofore acquired.

Inchoate as well as perfected rights are saved by such a clause.

The primary and dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use, unless a contrary intent is clearly expressed.

The fact that inconvenience or loss results to one, having no easement in a street, from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy

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or impair the usefulness of the street, does not, in the absence of a statute imposing a liability, give a right of action.

In an action brought by plaintiff, a corporation organized under the act providing for the incorporation of telegraph companies (Chap. 265, Laws of 1848), to restrain defendant from operating its road by the single-trolley system upon certain streets in the city of Albany, *held*, that as plaintiff had accepted its franchise, which authorizes it to construct and operate its lines upon streets and highways upon the express condition that they shall not be so constructed as to incommode the public use, and as defendant was occupying the streets in such a manner as to expedite public travel and promote the public use to which they were devoted, plaintiff's franchise was of a subordinate character and it could not complain that the system adopted by defendant interfered with the operation of its lines; that it was part of plaintiff's compact with the state that the maintenance of its lines shall not prevent the adoption of any safe, convenient and expeditious mode of travel, such as defendant's system was shown to be.

Story v. N. Y. E. R. R. Co. (90 N. Y. 122); *Lahr v. M. E. R. Co.* (104 id. 268), distinguished.

Also *held*, the fact that plaintiff's system of communication was only partially established in the public streets, its telephones being located and its wires grounded upon private property, and that defendant's method permitted the electric current used to propel its cars to escape and flow to plaintiff's grounded wires, thus inflicting serious loss, did not give a right of action, as the use of its grounded wires was a part of its system of telephonic communication through the streets which it maintains under the permission of the state and subject to the condition that it shall not incommode the use of the streets by the public; that its franchise was indivisible and entirely subservient to the lawful uses of the streets for public travel; that having accorded to the public an unrestricted right of passage, it could not question the form in which that right is enjoyed so long as it is lawful and is utilized with proper care and skill.

A motion by defendant for an extra allowance was denied upon the ground of want of power, the reason assigned being "that the action being to restrain defendant from employing a particular system only, and over a part only of its road, the franchise was not involved, and there is, therefore, no basis on which an allowance can be estimated." *Held*, error; that as the subject-matter litigated was the right of defendant to use the single-trolley system, if the right thus sought to be enjoined had a money value, and there was any evidence to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion and dispose of the application upon the merits.

H. R. T. Co. v. W. T. Co. (61 Hun, 140), reversed.

(Argued June 15, 1892; decided October 11, 1892.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made September 8, 1891, which reversed a judgment in favor of defendant entered upon the report of a referee, and granted a new trial.

This was an action by plaintiff, a telephone company, to restrain defendant from operating its street railroad by means of an electric motor, known as the single-trolley method, in certain streets of the city of Albany, on the ground that it would cause great and irreparable injury to plaintiff's telephone system and service.

Plaintiff was incorporated in April, 1883, under the act of 1848 (Chap. 265), "to provide for the incorporation and regulation of telegraph companies," and the several acts amendatory thereof. Defendant was incorporated in 1828 (Chap. 141, Laws of 1828) as a turnpike company, and constructed its road from the city of Albany to a point in the present village of West Troy. By chapter 233 of the Laws of 1862, the defendant was authorized to construct and maintain railroad tracks on its turnpike road, and to extend the same through the villages of West Troy and Cohoes, the town of Watervliet and into the city of Albany, and with the consent of, and under such restrictions as might be deemed proper by the common council of the city of Albany, to extend and maintain its tracks through Broadway in said city to the south ferry, and to operate its road by "any mechanical or other power * * * which the said company may choose to employ." Such consent was obtained, and defendant's tracks laid and the road operated by horse power until 1889. On June 17, 1889, defendant obtained permission from the common council of said city to use the single-trolley system of electric propulsion, and before this action was commenced had fitted up its road for operation by said system. Defendant necessarily used a powerful current of electricity, some of which escaped and passed through the earth and other conductors and affected plaintiff's lines so that its customers were annoyed with loud noises and its switch-board affected when one of defendant's cars passed near any of plaintiff's wires, some of which ran on the streets upon

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which defendant's tracks were laid. In consequence, the use of plaintiff's telephones were frequently rendered difficult and unsatisfactory and many times impossible. The referee, before whom the case was tried, found that an interference of the currents could be prevented by plaintiff using a complete metallic circuit, which would entail great expense and interference with its business, and by defendant substituting the double for the single-trolley system, or using the storage-battery system, which would entail less expense than for plaintiff to change its system.

Further facts are stated in the opinion.

John S. Wise for appellant. An electric street railway using the public highway occupies the same, and enjoys the easement of travel thereon as of equal dignity with any, all and every other person or vehicle upon the public highway; and that such enjoyment of the public highway for travel is within the original purposes for which the public highways were opened. Such enjoyment of the easement is pursuant to the primary object of dedication of the highway. (*People v. Kerr*, 27 N. Y. 188; *Mahady v. Bushwick R. R. Co.*, 91 id. 148; *Hussner v. B. C. R. R. Co.*, 114 id. 437; *S. R. Co. v. Cumminsville*, 14 Ohio St. 546; *Hobart v. Milwaukee, etc.*, 27 Wis. 94; *Hinchman v. P. H. R. R. Co.*, 17 N. J. Eq. 76; *L. & A. H. R. R. Co. v. Androscoggin*, 79 Me. 363; *Barney v. Keokuk*, 94 U. S. 324; *Pittsburg Appeal*, 122 Penn. St. 530.) The law of New York, upon which the plaintiff relies for its existence, recognized in express terms the undoubted principle that if the telegraph companies were to be permitted to enter the public highways at all, they would go upon such highways, not as peers, but as vassals. The law under which the telegraph companies are organized grants them no co-ordinate rights with travelers upon the public highway, but assigns them to a secondary and subordinate position, expressly placing them under the condition that in constructing their lines along and upon the public roads or highways, they may do so "provided the same shall not be so constructed

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as to incommode the public use of said roads or highways.” (*Blanchard v. W. U. T. Co.*, 60 N. Y. 510; *Knox v. Mayor, etc.*, 55 Barb. 404; *Story v. E. R. R. Co.*, 90 N. Y. 122; *Sheldon v. W. U. T. Co.*, 51 Hun, 591; *W. T. Co. v. C. L. Co.*, 18 J. & S. 488; *Tuttle v. B. E. Co.*, Id. 464; *Willis v. E. T. & T. Co.*, 34 N. W. Rep. 337; *Hewitt v. W. U. T. Co.*, 13 Wash. Law Rep. 461; Dillon on Mun. Corp. [4th ed.] §§ 698, 698 a.) Even if, in the enjoyment of a common right of user of the highway, a user in which both appellant and appellee are of equal dignity, the appellant has been guilty of a violation of the appellee’s rights, the way to redress those rights is not by an injunction. (*Heerman v. B. S., etc., Co.*, 8 Biss. 334; *M. B. Co. v. U. & S. R. R. Co.*, 6 Paige, 554.) It is further claimed for the defendant that admitting all the injuries set forth in the complaint, the damage sustained is *damnum absque injuria*. (*Dillon v. A. O. Co.*, 49 Hun, 565; *Frazier v. Brown*, 12 Ohio St. 294; *P. C. Co. v. Sanderson*, 113 Penn. St. 141; *P. R. R. Co. v. Merchant*, 119 id. 541; *Cassady v. Cavenor*, 37 Iowa, 300.) It is further contended that the case made by the plaintiff shows that the plaintiff has no equity. (*Waterman’s Eden on Injun.* 10, 11; *High on Injun.* § 35; *Hilliard on Injun.* [3d ed.] § 32; 1 *Barton’s Ch. Pr.* 435; *Branch v. Yauba*, 13 Cal. 190; *Wood v. Sutcliffe*, 2 Sim. [N. S.] 163; 16 Jur. 75; 8 Eng. L. & E. 217.)

Marcus T. Hun for appellant. The defendant is prior in the time of acquiring its right to use electricity upon its system and prior in equity to the plaintiff. (*In re City of Buffalo*, 68 N. Y. 172; *Mayor, etc., v. N. R. Co.*, 4 E. & B. 433; *N. Y. C. Co. v. Mayor, etc.*, 104 N. Y. 1; *People ex rel. v. Newton*, 112 id. 396; *In re N. Y. E. R. R. Co.*, 70 id. 338.) The plaintiff’s right to introduce its telephone system into the territory already occupied by the defendant was subsequent in time and subordinate in law to the rights claimed by the defendant. (Laws of 1848, chap. 265, § 5; *Bahady v. B. R. R. Co.*, 91 N. Y. 148; *M. T. & T. Co.*

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v. *C. L. Co.*, 18 J. & S. 488; *Sheldon v. W. U. T. Co.*, 51 Hun, 591; *Blanchard v. W. U. T. Co.*, 60 N. Y. 510; Wood on Nuisances, § 759; Morawetz on Corp. § 460; 1 Waterman on Corp. § 174; Lewis on Em. Domain, § 142. The General Telegraph Act confers no exclusive franchises. (Laws of 1884, chap. 534, § 4; *M. B. Co. v. U. & S. R. R. Co.*, 6 Paige, 554.) The injury is too intangible and too undefined to support a cause of action. (*S. W. Co. v. City of Syracuse*, 116 N. Y. 167; *Charles River Bridge Case*, 11 Pet. 420; *Turnpike Co. v. State*, 3 Wall. 210.) The use of an electric current by the defendant, in the movement of its cars, does not constitute a nuisance. (Laws of 1889, chap. 531.) The rights claimed by the telephone company, viz.: "An exclusive franchise," the legislature is forbidden by the Constitution to give (Const. N. Y. art. 3, § 18.) The owners of the land affected, alone, if any one, can sue to prevent the electric current being discharged into it. (*Wager v. T. U. R. R. Co.*, 25 N. Y. 526; *Lahr v. M. E. R. R. Co.*, 104 id. 291; *Sheldon v. W. U. T. Co.*, 51 Hun, 591.) The injury complained of by the plaintiff is *damnum absque injuria*. (*Lansing v. Smith*, 8 Cow. 146; *Governor v. Meredith*, 4 T. R. 794; *Bolton v. Crowther*, 2 B. & C. 703; *Graves v. Otis*, 2 Hill, 466; *Wilson v. Mayor, etc.*, 1 Denio, 595; *Benedict v. Goit*, 3 Barb. 459; *Green v. Borough of Reading*, 9 Watts. 382; *Benry v. P. & A. B. Co.*, 8 W. & S. 85; *Goszler v. Corporation of Georgetown*, 6 Wheat. 593; *In re Furman Street*, 17 Wend. 667; *Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98; *Radcliff v. Mayor, etc.*, 4 id. 195; *Davis v. Mayor, etc.*, 14 id. 506; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Kellinger v. F. S. etc., R. R. Co.*, 50 id. 206; *Arnold v. H. R. R. R. Co.*, 49 Barb. 108; Dillon on Mun. Corp. [4th ed.] § 987.) The electrical system to be used by the defendant, not having been defined by the legislative authority must be determined upon and selected by it, and this discretionary power of selection is not subject to review by the courts. (*Paine v. Vil. of Delhi*, 116 N. Y. 224, 229; *Lansing v. Toolan*, 37 Mich. 152; *Ely v. City*

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of Rochester, 26 Barb. 133.) To entitle the plaintiff to recover damage alleged to have been caused by the act of the defendant, it must show that the act was done maliciously or negligently. (*Hadleman v. Bruckhart*, 9 Wright, 517, 518; *Platt v. Johnson*, 15 Johns. 217; Gould on Waters, § 280; *Delhi v. Youman*, 45 N. Y. 362; *Bliss v. Greeley*, 45 id. 671; *Bloodgood v. Ayers*, 108 id. 400-407; *Barkley v. Wilcox*, 86 id. 140; *Acton v. Blundell*, 12 M. & W. 324; *Hadleman v. Bruckhart*, 45 Penn. St. 519.) The order appealed from denying a motion for extra allowance is reviewable in this court. (*Shiels v. Wortman*, 126 N. Y. 650.) The value of the franchise is a proper basis for an additional allowance. (*Conaughty v. S. C. Bank*, 92 N. Y. 401; *People v. U. & D. R. R. Co.*, 128 N. Y. 240-251.) The subject-matter of the suit, though not a franchise, constitutes a proper basis for an additional allowance. (*People v. N. Y. & S. I. F. Co.*, 67 N. Y. 71; *Lattimer v. Livermore*, 72 id. 174; *Johnson v. S. F. G., etc., Assn.*, 122 id. 330; *Barker v. Town of Oswegatchie*, 62 Hun, 208.) The hardship to the plaintiff, if any exists in this case, is not to be considered. (*Conaughty v. S. C. Bank*, 28 Hun, 373.) The value of the franchise was properly shown. (*Johnson v. S. F. G. M. Assn.*, 122 N. Y. 330; *Munro v. Smith*, 23 Abb. [N. C.] 276; *People v. A. & S. R. R. Co* 5 Lans. 25-36.)

Edwin A. Countryman and *John A. Delehanty* for respondent. The plaintiff is lawfully in possession of its lines and of such land as is necessary to be used in operating them. (Laws of 1848, chap. 365; Laws of 1853, chap. 471, *People v. M. T. Co.* 31 Hun, 596; *C. & P. T. Co. v. B. & O. T. Co.*, 7 At. Rep. 809; 66 Md. 399; *W. T. Co. v. City of Oshkosh*, 62 Wis. 32; *Attorney-General v. E. T. Co.*, L. R. [6 Q. B. Div.] 244; *People v. O'Brien*, 111 N. Y. 1.) Lands or property held by a corporation for a public use cannot be taken by another corporation for an inconsistent use. (*In re City of Buffalo*, 68 N. Y. 167; *In re N. Y., L. E. & W. R. R. Co.*, 99 id. 12-23; *P. T. Co. v. H.*

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R. T. Co., 19 Abb. [N. C.] 466; *Lahr v. M. E. R. Co.*, 104 N. Y. 268.) The franchise of the defendant gives it no right to operate its cars through the city of Albany by electricity. (Laws of 1889, chap. 531; *Davis v. Mayor, etc.*, 14 N. Y. 506; *People v. B. R. Co.*, 126 id. 29; *Mayor, etc., v. Root*, 8 Md. 95; *Brown v. Pendergast*, 7 Allen, 427; *People v. U. Ins. Co.*, 15 Johns. 380, 381; *Jackson v. Collins*, 3 Cow. 89; *Holmes v. Carley*, 31 N. Y. 290; *Hoyle v. P. & M. R. R. Co.*, 54 id. 332; *People v. Lacombe*, 99 id. 49; *Delafield v. Brady*, 108 id. 524-529; *Riggs v. Palmer*, 115 id. 506; *People v. Thompson*, 98 id. 6.) The simple question is whether, under these circumstances, the defendant ought and should be required to exercise its franchise in such a manner as not to injure or interfere with the property of the plaintiff. We submit that, in accordance with the great preponderance of modern authority, the maxim, *sic utere tuo ut alienum non laedas*, applies to this case. (*Bohon Case*, 122 N. Y. 18; *Cogswell Case*, 103 id. 10; *Brieson Case*, 103 id. 645; *Campbell v. Leamon*, 63 id. 568; *Aikin Case*, 20 id. 370; *Baskell Case*, 108 Mass. 208; *Franklin Co. Case*, 67 Me. 46; *Clark Case*, 10 R. I. 35; *Brayton Case*, 113 Mass. 218; *Boston Case*, 19 How. [U. S.] 263; *Noyes v. Bemphill*, 58 N. H. 536; *Brown v. Bowen*, 30 N. Y. 519; *Lansing v. Wiswall*, 5 Den. 213; *Stiles v. Booker*, 7 Cow. 266; *Wheeler v. Gilsey*, 35 How. Pr. 139; *Applegate v. Morse*, 7 Lans. 59; *Carleton v. Cote*, 56 N. H. 130; *Blaisdell v. Stephens*, 14 Nev. 17; *Shaffer Case*, 37 La. Ann. 242; *Reinhardt v. Mentasti*, L. R. [41 Ch. Div.] 685.) The one that uses or produces the dangerous element must also furnish the safeguards. (Cooley on Torts, 337; *Brill v. Flagler*, 23 Wend. 353; *Cooper v. Barber*, 3 Taunt. 99; *Bloodgood v. Ayers*, 108 N. Y. 400.) When the defendant received its license from the city to operate its road by electricity, it impliedly agreed to operate it in such a way as not to affect the rights of others. (*Vill. of Port Jervis v. Bank*, 96 N. Y. 557; *Mairs v. M. E. R. R. Co.*, 89 N. Y. 498-505; *Reed v.*

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State, 108 id. 407-412; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *B. & P. R. R. Co. v. F. B. Church*, 108 U. S. 317; *Bohan Case*, 122 N. Y. 18; Wood on Nuisances, §§ 754, 784, 785; *Bickok v. Bines*, 23 Ohio St. 523; *G. L. & C. Co. v. Vestry, etc.*, L. R. [15 Q. B. Div.] 1; *Geddis v. Proprietors, etc.*, L. R. [3 App. Cas.] 430; *Atty.-Gen. v. G. L. & C. Co.*, L. R. [7 Ch. J. Div.] 217; *Atty.-Gen. v. C. H. L. Asylum*, L. R. [4 Ch. App.] 146; *Coats v. C. R. W. Co.*, 1 R. & M. 181; *Queen v. B. N. Co.*, 6 B. & S. 631, 652; *Appeal of P. J. R. Co.*, 122 Penn. St. 512, 531; *Crawford v. Rambo*, 44 Ohio St. 279, 287; *I. G. L. & C. Co. v. Broadbent*, 7 H. L. C. 600, 610; *Reinhardt v. Mentasti*, L. R. [42 Ch. Div.] 685, 690; *Atty.-Gen. v. C. C. G. Co.*, L. R. [4 Ch. App.] 71, 80, 81.) It is no defense to say that plaintiff's lines are so established that they facilitate the injury. (*Fiere v. B. & S. L. R. R. Co.*, 22 N. Y. 204.) The plaintiff being first in possession, is first in law and equity. (Pom. Eq. Juris. § 414; *L. S. & M. S. R. Co. v. N. Y. C. & S. L. R. Co.*, 8 Fed. Rep. 858.) The injury to the plaintiff is irreparable. (Wood on Nuisances, § 770; *Commonwealth v. P., etc., R. R. Co.*, 24 Penn. St. 159; Gould on Waters, § 508.) The plaintiff is entitled to an injunction. (*Dry Dock v. Mayor, etc.*, 47 Hun, 221; *P. G. Co. v. C. G. Co.*, 89 N. Y. 497; *Story Case*, 90 id. 122.) There is nothing included within this action to form a basis for an extra allowance. (*Spofford v. T. L. Co.*, 9 J. & S. 230; *Connaughty v. S. C. Bank*, 92 N. Y. 401; *Spofford v. T. L. Co.*, 41 J. & S. 231; *Coates v. Goddard*, Id. 132; *People v. A. & S. R. R. Co.*, 5 Lans. 36; *Coleman v. Chauncey*, 7 Robt. 578; *A. D. Co. v. Libbey*, 45 N. Y. 499.) The value of the franchise cannot be taken as a basis. (*People v. A. & S. R. R. Co.*, 5 Lans. 25; *People v. G. V. R. Co.*, 95 N. Y. 666, 667; *Johnson Case*, 122 id. 330, 337; *People ex rel. v. Adams*, 38 N. Y. S. R. 880; *Jaeger's Co. v. Boutillier*, 43 id. 381; *H. F. Ins. Co. v. G. F. Ins. Co.*, Id. 454; *People v. U. & D. R. Co.*, 128 N. Y. 240, 251.) The loss to the defendant and the expenses which

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it has been put to by reason of the injunction, do not constitute a basis or a reason for an extra allowance. (*Connaughtly v. S. Bank*, 92 N. Y. 401, 404.) Where the case is one of hardship to the defeated party the allowance will not be granted. (*Losee v. Bullard*, 54 How. Pr. 322.)

MAYNARD, J. All the injuries of which the plaintiff complains are due to the adoption by the defendant of the single-trolley system of electric propulsion. It becomes, therefore, of the first importance to determine whether this change of motive power was authorized by law. The plaintiff makes a vigorous attack upon the right of the railway company to the enjoyment of such a franchise and urges many grounds in support of its position. We cannot assent to the argument of the learned counsel for the defendant that the determination of this question is immaterial, because the state alone, by its attorney-general, can bring suit for a usurpation of corporate powers, or, because ordinarily, the local authorities must prosecute for an unlawful obstruction of the streets, not involving the appropriation of private property. In the case of a corporation, exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, and the aggrieved party may be without remedy if the damage sustained is the result of the proper exercise of a power or privilege conferred by law, and a right of action is not given by express enactment. This immunity from liability does not, however, extend to acts which are *ultra vires*, or which are equivalent to a confiscation or condemnation of the property rights of the citizen, unless provision is made for due compensation. If the sovereign power has never granted to the defendant the right to make use of electricity in the traction of its cars in the streets of Albany, it must respond to the plaintiff and to all others whose lawful pursuits are invaded by its illegal procedure.

But we think it is clear that under the act of 1862 (Ch. 233), and the ordinances of the common council of the city, the defendant was invested with the authority to adopt this method

of transportation, and to place in the streets in question the apparatus and fixtures necessary for its practical and efficient use. The choice of a motive power is not expressly limited in the statute, except by the exclusion of the force of steam. It is not impliedly limited, except that the power selected must not be of such a kind or require such a mode of application as will make it a public nuisance, or render the passage of the streets unsafe or dangerous for travelers availing themselves of the ordinary means of locomotion.

The report of the referee removes all doubt with reference to the safety and practical usefulness of the system adopted by the defendant. He finds, in substance, that it is the most efficient and economical, and the best thus far devised, and less liable to accidents, through the displacement of machinery, than any other trolley system; that it subserves the public interests and satisfies the public wants, with respect to transportation; that it is not prejudicial to the public health, or dangerous to human life; and that no other system of electric propulsion of cars has thus far been demonstrated to be as practicable, effective and advantageous, both to the public and to private interests, as the overhead, single-trolley system.

As the evidence is not contained in the record, these findings must be deemed to have been supported by competent proofs, and they leave no room for the contention that the use of this system is unsafe, or dangerous, or in any degree a public nuisance.

The act of 1862 cannot properly be limited to such methods of operating street surface railways in cities as had then been invented and were then in actual use. The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. Electricity, as a natural and applied force, was then well known and it is reasonable to infer that its adaptation as a propelling power was even then anticipated. It would be an unjust

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reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass the inventive and progressive tendency of the people. The application by the defendant for this new grant of power, must have reminded the legislature that in thirty years its original franchise of a turnpike way had proved inadequate for the wants of a thickly populous community, and it could not have failed to perceive that in a like period of time the operation of street cars by horse power might become obsolete, or undesirable. It, therefore, wisely provided for the occurrence of such an emergency.

It is not to be denied, that it is a sound rule of statutory construction which permits nothing to be taken in a grant of corporate powers, that is not plainly expressed, or unequivocally given, or not demanded by necessary implication. The defendant claims nothing more; but the plaintiff endeavors to cut down the franchise bestowed by eliminating from the statute the general words of the grant. As in 1862 these railways were run exclusively by animal power, the provision in section 4 of the act, which authorizes the defendant to adopt any mechanical or other power, or the combination of them, which it might choose to employ, except steam, was superfluous, if its range of selection is to be confined to the motive forces which had then been discovered and employed. The history of plaintiff's franchise is instructive upon this point. It is an intruder in the public streets and not possessed of any property rights which a court of equity can be invoked to protect, if the canon of construction which it insists upon applying to the grant of the defendant's franchises, shall be allowed to prevail. It is incorporated under the act of 1848 (Chap. 265), providing for the formation of telegraph companies. At that time, and for twenty years afterwards, the

art of telegraphy, as known and practiced, did not include the transmission of human speech by means of the telephone over wires strung upon poles. But it has been held in other states and countries, and, as we think, rightly, that this form of transmitting messages through the medium of an electric current passing over extended wires, is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown. (*Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32; *Cumberland Telephone & Tel. Co. v. United Electric Railway Co.*, 42 Fed. Rep. 273; *Attorney-General v. Edison Telephone Co.*, L. R. [6 Q. B. D.] 244.)

It would also be a narrow and illiberal construction of the statute to hold that the defendant was irrevocably bound by the choice of a motive power made in 1862. It then selected the only practicable one, but the authority to employ others was not thereby exhausted. It was a continuing privilege and was intended to be potential whenever and as often as the means of public travel might be improved or facilitated by its exercise. Equally flexible was the power given to the common council of the city to impose such reasonable conditions upon the enjoyment by the defendant of the franchises of a street railway company as in their judgment the interests of the public seemed to require. Their authority, in this respect, was coincident in extent with the company's right of selection. They could limit the municipal assent to a railroad operated in a specified way, as they did by the ordinance of 1862, and while that remained unmodified no other method could be lawfully used, and they could, by a subsequent ordinance, as in 1889, authorize the necessary changes to be made in the equipment of the streets for the introduction of electricity as a propelling force. This power is fairly inferable from the original act, and may also, perhaps, be deduced from the provisions of the city charter, which authorize them to regulate the use of the streets by railways.

This case is clearly distinguishable from that of the *Third Avenue Railroad* (112 N. Y. 396) cited at length by plain-

tiff's counsel. There the railroad company had no express grant of legislative authority and the consent of the municipality was refused. It attempted to override the local authorities and compel them by mandamus to give their approval to the opening and excavation of the streets for the purpose of substituting a subsurface mode of operation, when the granting of the permission plainly involved the exercise of judgment and discretion. It was held that under such circumstances the department of public works could not be coerced to act favorably upon the company's application. But the case is not authority for the broad proposition, for which the plaintiff contends, that where the right to select a motive power is expressly given and is not limited, either as to time or kind, and a selection has been made with the approval of the city authorities, the company cannot subsequently adopt a new and better system of propulsion upon obtaining the municipal consent thereto.

The defendant was not subject to the provisions of section 12 of the Street Surface Railroad Act of 1884 (Ch. 252), as amended by chapter 531 of the Laws of 1889, requiring the approval of the railroad commissioners and the consent of the owners of one-half in value of the property abutting upon the streets.

It had the right to make the change under the act of 1862 upon obtaining the consent of the common council, and hence it is embraced within the saving clause contained in section 18, which declares that the act of 1884 shall not interfere with, repeal, or invalidate any rights theretofore acquired under the laws of the state by any horse railroad company, or affect or repeal any right of an existing street surface railroad company to construct, extend, operate and maintain its road in accordance with the terms and provisions of its charter and the acts amendatory thereof. Inchoate, as well as perfected rights are saved by such a provision. (*N. Y. Cable Co. v. Mayor, etc.*, 104 N. Y. 1.)

The defendant's authority to use electric motors in the propulsion of its cars in the streets of Albany and to operate them

by the single-trolley system, cannot, therefore, be successfully questioned, and, unless some actionable damage has resulted, or will result, to the plaintiff therefrom, its complaint was properly dismissed by the trial court.

There is no question of prior equities involved. It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use to which they were originally devoted. The condition contained in the plaintiff's grant would have been implied had it not been expressly named.

The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable. A different rule prevails if there has been an encroachment upon private rights to the extent of an appropriation of private property, and it was upon this ground that the decision in the elevated railroad cases was placed. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. E. R. R. Co.*, 104 id. 268.) It was there held that an abutting owner has an easement of light, air and access in the street in front of his premises, of which he cannot be lawfully deprived without compensation, by the erection and use of an elevated railway structure.

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But the plaintiff has no easement in the public streets. It is there by virtue of a legislative grant, revocable at the pleasure of the power which made it, constituting, while it continues, a valuable franchise, which is recognized as property in the fullest sense of the term. (*People, etc.*, v. *O'Brien*, 111 N. Y. 1.) The plaintiff's title to this property is, however, encumbered by a condition which diminishes its value, and it cannot rightfully complain of the burden which it has voluntarily assumed. It is a part of its compact with the state that the maintenance of its lines of communication shall not prevent the adoption by the public of any safe, convenient and expeditious mode of transit such as the defendant's system has been shown to be. It is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave it existence.

These considerations necessarily dispose of one of the grounds upon which the plaintiff claims to be entitled to relief from the special injury sustained by the acts of the defendant, namely, the derangement of the electric currents upon its lines of wire by means of induction, as it is called, in electrical dynamics.

It seems to be indispensable to the successful prosecution of the plaintiff's business, that it should make use of an exceedingly weak and sensitive current of electricity. By a law of electric force, not clearly defined or understood, the transmission of a powerful current, such as the defendant must use to supply motion to its cars, along a line of wire parallel with and in close proximity to the plaintiff's wires, induces upon the latter an additional current, which renders the operation of the plaintiff's telephones at all times difficult and sometimes impracticable. It is found that this disturbance cannot be avoided by the defendant without a complete change of the system adopted, and the use of motors which are more expensive, more dangerous and less useful and efficient. It is obvious, that to require such change to be made would be to grant to the plaintiff, by a decree of the court, that which the legislature has expressly and intentionally withheld. But the

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plaintiff is exposed to another danger which deserves consideration. Its system of communication is only partially established in the public streets. Its telephones are located upon the premises of its subscribers and patrons, and at a central exchange, which is upon private property. Its instruments are connected by branch wires with the main wires suspended upon the poles in the streets. To render their respective plants available, both parties must have a return electric current, and both use the earth for that purpose. The plaintiff grounds its wires upon private property and, in many cases, connects them with the gas and water pipes and, in this way, establishes and completes its required circuit.

It is immaterial whether its wires are grounded upon its own property or that of others, who permit the plaintiff to so use their premises. Its possession as a licensee would be lawful while the license continues. The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the rails into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as conduction. The defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff to its damage.

We are not prepared to hold that a person even in the prosecution of a lawful trade or business, upon his own land, can gather there by artificial means a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an

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extent as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided, because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which the plaintiff objects, but the projection upon its premises by unnatural and artificial causes of an electric current in such a manner and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature that caused the damage. Except where the franchise is to be exercised for the benefit of the public the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form, but such authority carries with it no lawful right to do an act which would be a trespass, if done by a private person conducting a like business. If either collects for pleasure or profit the subtle and imperceptible electric fluid, there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water power; that of providing an artificial conduit for the artificial product, if necessary to prevent injury to others.

But the record before us does not require a determination of the question in this form. The use which the plaintiff is making of its grounded wires, is a part of its system of telephonic communication through the public streets, and a necessary component of the service it maintains there under the permission of the state and is subject to the condition

that it shall not incommode the use of the streets by the public. It is one indivisible franchise and is in its entirety subservient to the lawful uses which may be made of these thoroughfares for public travel. In this respect no distinction can be made between the injuries resulting from induction and conduction.

In the disposition of this appeal there has been no occasion to make any application of the rule that where a public use authorized by law takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use furnishes no basis for damages. (*Radcliff Exrs. v. Mayor*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R.*, 23 id. 42; *Moyor v. N. Y. C. & H. R. R. R.*, 88 id. 351; *Uline v. N. Y. C. & H. R. R. R.*, 101 id. 98; *Am. Bk. Note Co. v. N. Y. E. R. R. Co.*, 129 id. 252.) Under such a rule it would be a grave question whether the injuries to which the plaintiff was subjected would not, if made permanent, constitute a servitude upon its property which could not be imposed without compensation, provided the parties were occupying the streets upon an equal footing. As was said by Judge ANDREWS in *Cogswell v. N. Y., N. H. & H. R. R. Co.* (103 N. Y. 14): "It is, in many cases, difficult to draw the line and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy."

We are spared the task of discrimination in this case by reason of the legal attitude which the plaintiff has assumed in its occupation of the streets. It has accorded to the public, by the manner in which it has elected to use its franchise, the unrestricted right of passage, and it cannot question the form in which such right shall be enjoyed so long as it is of lawful origin and is utilized with proper care and skill. The defendant's mode of conveyance of passengers is of this character, and the plaintiff can no more justly complain of its loss from this source than it could if, by the jarring of loaded vehicles passing up and down Broadway, its delicate and sensitive

instruments were displaced and their beneficial use impaired or destroyed.

There is also an appeal by the defendant from an order denying a motion for an extra allowance of costs. The decision of the court below was placed upon the ground of a want of power, and the special reason assigned was "that the action being to restrain the defendant from employing a particular system only, and over a part only of the road, the franchise was not involved, and there is, therefore, no basis on which an allowance can be estimated."

In denying the motion for this sole cause we think the Supreme Court erred. The subject-matter of the controversy litigated was the right of the defendant to use the single-trolley system in the operation of its road upon Broadway and South Ferry street, and the prayer for relief in the complaint is that an injunction issue "restraining the defendant from operating its said railroad through the city of Albany by the electric system herein described." If the right thus sought to be perpetually enjoined has a money value, and there was any evidence in the moving papers tending to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion and dispose of the application upon its merits. We have examined the record sufficiently to satisfy us that there was some proof of this character.

One witness testifies that the right of the defendant to run its cars by electric motors upon the single-trolley system in the city of Albany is worth to the company the sum of at least \$300,000, and as against the double-trolley system, or any other known system, at least \$76,000. We are not permitted to say how much this and other similar evidence may be worth. We are dealing exclusively with a question of power. Whether there shall be any allowance at all, or what the amount of it shall be, and how far the hardships of the plaintiff's situation shall affect the allowance, if at all, are questions primarily to be considered by the Special Term and can be safely intrusted to its determination. The authorities cited in the opinion of the General Term were all cases where no

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evidence was presented as to the commercial value of the right or franchise in question, and the decision was that in the absence of such evidence it could not be presumed to have a particular value. The just inference from them is that if such proofs had been submitted the court might have considered them as the basis of an allowance. (*People v. Genesee Valley Can. R. R. Co.*, 95 N. Y. 666; *Conaughty v. Saratoga Bank*, 92 id. 401; *Heilman v. Lazarus*, 12 Abb. [N. C.] 19.)

The order of the General Term granting a new trial must be reversed and the judgment entered upon the report of the referee affirmed, with costs in all courts.

The order denying the motion for an additional allowance should be reversed, with costs, and the motion remitted to the Supreme Court to be there heard upon its merits.

All concur.

Orders reversed and judgment affirmed.

In the Matter of the Probate of the Last Will and Testament
of JAMES STEWART, Deceased.

Under the provision of the Code of Civil Procedure (§ 2576), providing for appeals from surrogates' decrees, an appellant desiring a review upon the facts is not required to so specifically state in his notice of appeal. The grounds of the appeal are not required to be stated, and a notice that the appeal is "from the decree, and each and every part thereof, is sufficient to authorize such a review.

Said section was intended to declare affirmatively the power of the General Term to review both the facts and the law on appeals from surrogates' decrees, not to regulate the practice in bringing such appeals, except to require that, when the appeal is from a decree rendered on trial of an issue of fact, a case must be made and settled, as on an appeal in an action. The rule that in an action tried by a jury, a motion for a new trial is necessary to review the facts, is not applicable to a trial before a surrogate. Reported below, 61 Hun, 544.

(Submitted June 15, 1892; decided October 11, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 2, 1891, which reversed a decree of the surrogate of Kings county

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admitting to probate a will of James Stewart, deceased, dated November 16, 1881, and a codicil thereto, dated January 21, 1884, and refusing probate of a will of said deceased dated March 12, 1887, and codicils thereto.

The facts, so far as material, are stated in the opinion.

William D. Veeder and *D. W. Northup* for appellants. An appeal from a decree of the surrogate can only be taken upon questions of law, or upon the facts, or upon both. (Code Civ. Pro. § 2576.) There was no appeal in this case upon the facts. (*Burger v. Burger*, 111 N. Y. 525; *In re Hunt*, 110 id. 278; Code Civ. Pro. § 2586.) There was no statement in the case presented to the General Term that the case contained all the evidence, hence the General Term could not review the facts. (*Aldridge v. Aldridge*, 120 N. Y. 614; *Porter v. Smith*, 107 id. 534; *Murphy v. Board of Education*, 53 Hun, 171; *Burger v. Burger*, 111 N. Y. 530; *Brayton v. Sherman*, 119 id. 623; *Halpin v. P. Ins. Co.*, 118 id. 165.) It is only when the General Term reverses a decree of the surrogate upon questions of fact, which it has power to review, that it can direct a trial by jury of the issues. (Code Civ. Pro. § 2588.) No stipulation for judgment absolute was necessary on this appeal, as the ground of appeal is want of power of the General Term to make the order. (*Beman v. Todd*, 124 N. Y. 114.)

W. B. Maben for respondents. This appeal should be dismissed because the notice of appeal contains no stipulation or assent that, if the order is affirmed, judgment shall be rendered absolute against defendant. (Code Civ. Pro. § 191, subd. 1.) The appellate court had the right to decide this case upon questions of fact. (Code Civ. Pro. § 2586; *Angvine v. Jackson*, 100 N. Y. 470; *Sutton v. Ray*, 72 id. 482.) An appeal to the Court of Appeals will not be entertained when the court below has ordered a new trial, if any material and controverted question of fact was involved and the General Term granted a new trial. (*Harus v. Burdett*, 73 N. Y. 136; *Luebley v. Conner*, 78 id. 218; *Wheston v. David*, 81

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id. 645; *Banks v. N. H. R. R. Co.*, 95 id. 656; *Burger v. Burger*, 111 id. 523; Code Civ. Pro. § 2588.)

ANDREWS, J. The General Term on appeal from the decree of the surrogate, which admitted to probate the will of 1881, and the codicil thereto, and denied probate to the will of 1887, on the ground that it was obtained by fraud and undue influence, reversed the decree "on questions of fact," and directed issues to be framed and sent to a jury for trial. The appeal to this court is taken on the ground that the General Term has no power to review the facts, for the reason that the notice of appeal to the General Term did not specify that the appeal was taken on the facts, but was in general terms only "from the decree and each and every part thereof."

It is insisted that upon such a notice only questions of law presented by exceptions were brought before the General Term, and that it could not reverse on the facts upon a consideration of the weight of preponderance of evidence, or because in its judgment the facts should be re-examined by a jury. The appellant relies in support of this contention upon section 2576 of the Code of Civil Procedure. That section, which is found in the article relating to appeals from orders or decrees of surrogates, is as follows: "The appeal may be taken upon questions of law, or upon the facts, or upon both. If it is taken from a decree rendered upon the trial by the surrogate of an issue of fact, it must be heard upon a case to be made and settled by the surrogate, as prescribed by law for the making and settling of a case upon an appeal in action."

The claim is that if the appellant desires a review upon the facts in the Supreme Court he must specify in his notice of appeal. Section 2576 does not require that such specification should be made, nor is it elsewhere prescribed, but this as is claimed is an implication from the language of the section. We are not satisfied that this contention is well founded. Section 2574, which prescribes how an appeal may be taken,

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declares that it must be by written notice to be served, "referring to the decree or order appealed from and stating that the appellant appeals from the same or from some specified part thereof." It is not required that the grounds of the appeal shall be stated in the notice.

If under section 2576 it is necessary to specify that the appeal is upon the facts, in order to give jurisdiction to the appellate court to review them, it would seem equally necessary that if the appeal was upon the law, it should be so specified in order to enable the court to review the exceptions. We think section 2576 was intended to declare affirmatively the power of the General Term to review both the facts and the law on appeals from surrogates' decrees, and was not intended to regulate the practice in bringing appeals, except to require that when the appeal is from a decree rendered upon a trial of an issue of fact, a case must be made and settled, as on an appeal in an action. That was done in this case.

The question of undue influence in procuring the will of 1887, was the issue litigated and upon which the determination of the surrogate proceeded, and a large volume of testimony was presented to the General Term, and that court on reviewing the facts reversed the decree and ordered issues. The notice of appeal informed the respondent that the entire decree was challenged and the case prepared exhibited both the questions of fact and the law involved.

The rule that in an action tried by a jury a motion for a new trial is necessary to enable the General Term to review the facts, is based upon reasons wholly inapplicable to the case of a trial before a surrogate. (*Burger v. Burger*, 111 N. Y. 528.)

We are of opinion that the point urged is not well taken and that the General Term had jurisdiction to review the facts.

The question is new and it is proper under the circumstances to dismiss the appeal, leaving the parties to be governed by the order of the General Term.

All concur.

Appeal dismissed.

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FREDERICA PREUSTER, Appellant, v. THE SUPREME COUNCIL
OF THE ORDER OF CHOSEN FRIENDS, Respondent.

The statement, in an application for life insurance, of the age of the applicant is material.

In an application by R. for membership in defendant's order the applicant stated his age to be sixty years, and that any untrue or fraudulent statement therein would forfeit the applicant's rights to any benefits. The certificate issued to him stated that it was subject to the conditions set forth in the application for membership. In an action upon the certificate it appears that it was the custom of the order not to accept as a member one over sixty, and that R. was at least sixty-one at the time of his application, *held*, that the false statement was material, and in the absence of a waiver of the forfeiture, the action was not maintainable.

A rumor that the statement was false reached the secretary of defendant's local council about a year after the issue of the certificate, but not from a reliable or authentic source, and without any proof as to its correctness. About two years thereafter, upon application by R. for an allowance on account of disability, a committee was appointed to investigate and ascertain the truth of the rumor. The committee procured from Saxony where R. was born a certificate of his birth which showed that his statement was false, and thereupon reported in favor of his expulsion, and fifteen days thereafter the council heard the report read, and voted to expel him. No assessments were collected from R. thereafter, but one or more were collected by the secretary, who was a member of the committee, between the receipt by it of the certificate and its report. Said certificate was held below to be incompetent as evidence, and the proof on the trial contradicted it as to the exact date of R.'s birth. *Held*, the facts did not establish a waiver.

Reported below, 60 Hun, 824.

(Argued June 16, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1891, which reversed an order of Special Term granting a new trial, and directed judgment in favor of defendant upon a verdict directed by the court.

This was an action by plaintiff as the beneficiary named in a certificate of membership issued by defendant, a fraternal assessment association, to C. C. Rein.

The certificate provided that \$2,000 should, in case of

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Reim's death, be paid to plaintiff "in the manner and subject to the conditions set forth in the laws governing said relief fund and in the application for membership." Said application was made May 23, 1822, and stated that Reim was born February 4, 1822, and was sixty years old. The application contained this condition: "Any untrue or fraudulent statement made above or to the medical examiner * * * shall forfeit my right to all benefits and privileges therein."

Further facts are stated in the opinion.

Frank Brundage for appellant. The trial court erred in directing a verdict. There was no forfeiture by reason of the misstatement of age. The only limit of age provided is that the applicant for membership shall be over eighteen years of age. (Const. art. 6, § 1; *Morrison v. W. O. F. Ins. Co.*, 18 N. W. Rep. 15; *Darrow v. F. F. Society*, 116 N. Y. 537.) If there was a forfeiture it was waived by levying and collecting the assessments after defendant had knowledge of the misstatements by Reim as to his age. (*M. M. B. Assn. v. Beck*, 77 Ind. 203; *Carroll v. C. O. Ins. Co.*, 40 Barb. 292; *Vail v. G. M. Ins. Co.*, 19 id. 440; *Frost v. S. M. Ins. Co.*, 5 Den. 154; May on Ins. [2d ed.] §§ 143, 372, 512; *Pechner v. P. Ins. Co.*, 65 N. Y. 195; *Bank of U. S. v. Davis*, 2 Hill, 451-461; *Sentell v. O. C. F. Ins. Co.*, 16 Hun, 516; *Van Shoik v. N. F. Ins. Co.*, 68 N. Y. 434-437; *Shay v. N. B. Society*, 54 Hun, 109; *Erdman v. M. Ins. Co.*, 44 Wis. 376; *Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 247; *Wissell v. G. M. L. Ins. Co.*, 76 id. 115; *Walsh v. A. L. Ins. Co.*, 30 Iowa, 133; *Mowery v. Rosendale*, 74 N. Y. 360; *Wyman v. P. M. L. Ins. Co.*, 119 id. 274; *Roby v. A. C. Ins. Co.*, 120 id. 510; *Titus v. G. F. Ins. Co.*, 81 id. 418; *McNally v. City of Cohoes*, 127 id. 353.) Should it be held that the information received by the officers charged with the duty of levying, collecting and receipting the assessments was not such knowledge as required them to withhold and refuse payment of the assessments until the adjudication of expulsion was made, as was held by the General Term, then when that

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adjudication was made they were bound to assert the forfeiture and offer to return the assessments so collected; and not having done so, but having retained them, they waived the forfeiture and validated the certificate of insurance. (*Kabok v. P. M. L. Ins. Co.*, 21 N. Y. S. R. 203-208; *Carroll v. C. O. Ins. Co.*, 1 Abb. Ct. App. Dec. 316, 321; *Hyatt v. Clark*, 118 N. Y. 569; *Pratt v. D. H. M. F. Ins. Co.*, 130 id. 217; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 id. 263, 275.) The contention of defendant's counsel that because Reim misrepresented his age there never was a valid contract of insurance is untenable. (*M. M. B. Assn. v. Beck*, 77 Ind. 203; *Frost v. Sar. M. Ins. Co.* 5 Den. 154; *Van Schoick v. N. F. Ins. Co.*, 68 N. Y. 439; *Titus v. G. F. Ins. Co.*, 81 id. 410; *Viall v. G. M. Ins. Co.*, 19 Barb. 440; *Kenyon v. K. T. M. M. Assn.*, 122 N. Y. 247.)

Cuthbert W. Pound for respondent. The doctrine of waiver cannot be applied to this case and a new trial should not be ordered. (*Devins v. M. & T. Ins. Co.*, 83 N. Y. 173; *Robertson v. M. L. Ins. Co.*, 88 id. 541; *Swett v. C. M. R. Society*, 78 Me. 541; *Bartean v. P. M. L. Ins. Co.*, 67 N. Y. 595; *Hennessey v. Wheeler*, 69 id. 271; *Ronald v. M. R. Assn.*, 23 Abb. [N. C.] 271; *Bennet v. L. C. M. Ins. Co.*, 67 N. Y. 274; *Titus v. G. F. Ins. Co.*, 81 id. 410; *Dowd v. A. F. Ins. Co.*, 16 N. Y. S. R. 342.) The principle of waiver is not applicable to the acts of officers of benefit associations. (*Bellenburg v. I. O. B. B.*, 94 N. Y. 584; *M. B. Soc. v. Burkhart*, 7 West. R. 527; *Munrich v. S. L. of K. & L. of H.*, 3 N. Y. Supp. 552; *Brewer v. C. M. L. Ins. Co.*, 14 Gray, 203-209; *Baxter v. C. M. F. Ins. Co.*, 1 Allen, 294; *Mayer v. E. R. F. L. Assn.*, 42 Hun, 237; *Hale v. M. M. F. Ins. Co.*, 6 Gray, 169.) The assessment and payment did not constitute a waiver on the part of the defendant, nor did the payments alone create an estoppel in plaintiff's favor. (*Lyon v. Supreme Assembly*, 153 Mass. 83; *McCoy v. R. C. Ins. Co.*, 152 id. 272; *Burbank v. B. P. R. Assn.*, 144 id. 434.)

Opinion of the Court, per FINCH, J.

FINCH, J. That the right of Reim, under whose certificate the plaintiff claims, to membership in the order defending was liable to forfeiture for his false statement of his age is well established by the proofs. Without reference to the baptismal certificate, held to be incompetent as evidence, there was enough to show that while representing himself at the time of his application to be sixty years of age, he was in fact at least sixty-one. Upon a question of life insurance, the age of the applicant is always more or less material because it is necessarily a prominent factor in the risk assumed. While it appears to be true that nothing in the constitution of the order forbids an insurance upon a life beyond the age of sixty, yet the real age is material, and the evidence indicates that the custom and habit of the order was not to accept a membership after the age of sixty had been reached. The table of rates appearing in the papers stops at about that age, and it is manifest that if the applicant had told the truth the risk might have been declined. His certificate of membership, upon its face, shows that it was granted upon the conditions specified in his application, and the rules and regulations of the order; and one of the conditions contained in the form of application was that any untrue or fraudulent statement made therein, or a suspension or expulsion from the order, should forfeit the right to all privileges or benefits thereof. It is alleged in the complaint not only that the representation of Reim as to his age was untrue, but also that it was fraudulent, and the evidence tends to support that inference. Whether the statement was knowingly or ignorantly false, the result of a forfeiture followed in accordance with the terms of the contract, and operated as a complete answer to the plaintiff's claim unless the forfeiture was effectually waived, and it is upon such a waiver that the whole contention of the plaintiff rests.

In considering that question it is necessary to recall the facts and the dates of their occurrence, and we may admit them to be, substantially, such as the appellant claims them to be from the evidence in the record. The first information of a false statement of his age in the application of the member reached

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the secretary of the local council about a year after the issue of the certificate, but in the form of a rumor, and obviously without any proof of its accuracy or truth, and coming from no reliable or authoritative source. It seems to have raised no serious doubt in the mind of the officer, and the membership of Reim remained unassailed until about two years later, when he made application for an allowance on account of disability. That application to the local council turned its attention to the rumors which had existed, and a committee was appointed to investigate them and ascertain the truth. That truth was not easily reached outside of those who were interested to conceal it, and one of the modes of inquiry adopted by the committee was an application to the foreign authority in Saxony having a registry of the birth of Reim. That certificate, showing the falsehood of his statement, was received by the committee at least as early as June twenty-third. It made a report in favor of expulsion on July thirteenth, and on the twenty-eighth of July the council heard the report read and voted to expel. No assessments were collected after that date, but one or more were collected between the receipt by the committee of the foreign certificate and the committee's report to the local council. The secretary of that council who received such assessments was a member of the investigating committee, and his alleged knowledge of the fraud is sought to be imputed to the council and to the defendant. The secretary was an officer of the local council, appointed by it, and subordinate to its authority. The supreme council had no direct control over him, and could reach him only through his immediate superiors. Assuming that the local council may be deemed within its sphere, the general agent of the defendant association, and that by receiving or expelling members it could in some measure bind or release the order, and so might have waived the forfeiture incurred, the court below has held that the evidence did not establish such waiver, and I concur in that opinion. Certainly there was no intention to waive the forfeiture on the part of the local council or manifested by its action. It was bound to treat the accused member as innocent until satisfied

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of his guilt and having full knowledge of the facts, and was not required to act by choosing between a waiver and a forfeiture until the truth was reached in a form and so supported by evidence as to make it a duty to act decisively in one direction or the other. The accused member, pending the investigation, must be deemed to have voluntarily taken the risk of its result. He must have known that it was in progress, and that his assessments were paid and received upon an assumption of his innocence, which would fail if, in the end, the truth should be disclosed. After the knowledge obtained from the foreign registry reached the local council through the report of its investigating committee, no assessments were collected or accepted. The council seems to have conducted the investigation with reasonable diligence. If it had purposely or negligently delayed the inquiry with a view to get as many assessments as possible before the forfeiture, and with full knowledge of the truth, a different question would be presented. But here it acted in good faith, and promptly insisted upon the forfeiture when satisfied of the fact that it had been deceived.

Two circumstances are to be specially remembered in arriving at a conclusion. No authoritative notice of his true age was ever given by Reim or those who represented him, and which for that reason bound him, and so put the company to its election. There was simply an accusation by third persons, never admitted by the deceased, and the truth or falsity of which was open to inquiry. In addition it is to be observed that the foreign certificate, objected to by the appellant, was held inadmissible by the General Term, and did not justify the action of the local council. It proved nothing on the trial, and so proved nothing to the local council which acted without any knowledge, except inadmissible hearsay, and so acted at its peril. The fact established on the trial contradicted the certificate, and of the real fact the local council never had any full knowledge until after premiums were refused. Pending the inquiry there was knowledge of an accusation never admitted by the assured and the truth of which was in doubt. Until

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the council heard the evidence and acted upon it as satisfactory it cannot be said that it had full knowledge of the actual fact, which all the time, and even down to the trial, was in dispute. If notice of the truth had been given by Reim, or those representing him, so as to have bound them and required the belief of the insurer, a different conclusion might be required. But full knowledge of an accusation is by no means a necessary knowledge of the fact, and the real truth as to the age of the assured was never lawfully proven till the date of the trial, and then by evidence which never came before the local council at all. Their action at the date of the expulsion may estop them from denying a then existing knowledge, but before that date, neither by estoppel nor as matter of fact can it be said that full knowledge existed.

We think the conclusion of the General Term was correct and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

185	485
138	205

**THE CHATHAM NATIONAL BANK of New York, Respondent,
v. JAMES H. PRATT, Appellant.**

Defendant, in April, 1885, for the stated purpose of giving W. credit with plaintiff, executed to it a guaranty of collection of all "checks, drafts and promissory notes," upon which W. was then or should thereafter be liable to it "as maker, indorser," etc. Plaintiff held at the time a demand note indorsed by P. In an action upon the guaranty these facts appear: Plaintiff's president, in the latter part of 1885, informed defendant that it was taking no proceedings to collect the note, but was endeavoring to obtain payment of this and other indebtedness, from W., that this would take a long time and advised that it would be unwise and injudicious in defendant's interest if more was done toward pressing payment. Defendant approved this course. Plaintiff continued to press payment, but not succeeding, on July 17, 1886, wrote to W.; that unless the note was paid before 3 P. M. it would "proceed to measures for collection." W. was then in plaintiff's city and could have been served with process; it was not served until November twenty-nine. An answer to the complaint was served January 7, 1887; on April eighth plaintiff's attorney moved to dismiss the answer as frivolous and for judgment. The answer was withdrawn and on April

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fifteen judgment was entered. *Held*, that as matter of law plaintiff did not exercise due diligence; and that a submission of the question to the jury was error.

(Argued June 16, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made November 18, 1891, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. Ellery Anderson for appellant. Defendant's guarantee was simply an undertaking on the part of James H. Pratt that the obligations of William T. Pratt would be paid if prosecuted with reasonable diligence. (*Craig v. Parkis*, 40 N. Y. 181; *N. Ins. Co. v. Wright*, 76 id. 445; *S. S. N. Bank v. Sloan*, 57 Hun, 267, 270.) The excuse offered by the plaintiff for its failure to take proceedings on the Keystone note does not relieve it from the consequences of its delay after July 17, 1886. (*Craig v. Parkis*, 40 N. Y. 181; *Mead v. Parker*, 111 id. 259, 262; *Wright v. Bank of the Metropolis*, 110 id. 249.)

Daniel P. Hays for respondent. Evidence that a delay in the prosecution of the claim was with the acquiescence of the guarantor is competent as showing a waiver by the guarantor of his strict right to take advantage of the creditor's indulgence to avoid the guaranty. (*Mead v. Parker*, 111 N. Y. 259.) Waiver of a forfeiture or of any other strict right is a proper defense to a claim made under the forfeiture. (*Homer v. M. L. Ins. Co.*, 67 N. Y. 478; *Chester v. Bank of Kingston*, 16 id. 338.) Declarations of a principal made during the transaction of the business for which the surety is bound so as to become part of the *res gestæ*, are competent as against the principal. (*Hatch v. Elkin*, 65 N. Y. 496; *H. M. Co. v. Farrington*, 16 Hun, 591; *Ayer v. Getty*, 11 N. Y. S. R. 303.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. This action is brought on the following guaranty signed by the defendant:

“NEW YORK, *April 25, 1885.*

“For value received and for the purpose of giving William T. Pratt credit at the Chatham National Bank of New York, I hereby guaranty the collection of all checks, drafts and promissory notes upon which said William T. Pratt is now or hereafter shall be liable to said bank as maker, indorser, drawer or acceptor, to an amount not exceeding ten thousand dollars, hereby waiving demand and notice of non-payment thereof.

“JAMES H. PRATT.”

At the time when this guaranty was executed, there was in the possession of and owned by the plaintiff a promissory note made by the Keystone School and Church Furniture Company for ten thousand dollars, payable on demand to the order of William T. Pratt and indorsed by him and by a firm of Baker, Pratt & Co., and delivered to plaintiff. The note was dated January 28, 1881, and had been discounted by plaintiff at the request of William T. Pratt.

The guaranty was delivered by James H. Pratt at about the time it bears date and while the promissory note above described was held and owned by plaintiff. The William T. Pratt above spoken of was a member of the firm of Baker, Pratt & Co., which firm was also largely indebted to the plaintiff at this time and so continued to be for some period subsequent to July, 1886. It is not material in our view to enter upon an examination of the subject of the indebtedness of this firm or to refer particularly to the guaranty against loss which the plaintiff had for that indebtedness. This action is not brought upon any guaranty in connection with the firm indebtedness, but is brought solely by reason of the demand note above alluded to and because of its nonpayment by the indorser, William T. Pratt.

The plaintiff did not commence an action against William T. Pratt on that note until the 29th of November, 1886, more than a year and a half after the execution of the guaranty, and

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obtained judgment against him April 15, 1887. Execution upon the judgment was issued upon the last-named day and returned wholly unsatisfied.

Did it proceed with due and reasonable diligence?

As this guaranty was executed for the express purpose of giving William T. Pratt credit at the bank, and as it referred to notes upon which he was already liable, as well as those upon which he might thereafter become liable, we may assume that the guaranty was intended to be of some benefit to William as to liabilities already incurred, and that in order to hold the guarantor it was not necessary that plaintiff should at once commence legal proceedings to collect the amount of this ten thousand dollar note from William.

The period, however, which did elapse before any proceedings were taken, if unexplained, went far beyond the utmost limit which a very liberal construction of the obligation of plaintiff would permit. The plaintiff endeavored to discharge the burden of explaining this long delay. The president of the bank was sworn as a witness upon the trial, and testified to an interview which he alleged he had with the defendant some time in the latter part of 1885, and in which he informed the defendant that the bank was taking no proceedings towards collecting the note in question, but was endeavoring to obtain from William and his firm payments on their indebtedness as fast as possible, and that it would probably take a long time, and that it would be injudicious and unwise in the interest of the defendant, as well as the others, if the bank should do any more than was being done towards pressing payment. The president further testified that the defendant approved the course taken by the bank, and said it was the correct one and in the interest of all parties concerned. The defendant denied absolutely any such conversation, but in the light in which the case was sent to the jury and of the verdict rendered, we must take it that this evidence of the president was adopted as the truth of the case.

During the following winter and spring (of 1886) the position continued about the same, the bank continuing to press

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the claims against William and his firm, but not succeeding in obtaining payment so far as the demand note was concerned. At length it appeared that the bank itself recognized the fact that all reasonable time had elapsed in which efforts to obtain payment of this note other than by suit had expired. We entirely agree with that opinion. On the 17th day of July, 1886, fifteen months almost from the time when the guaranty was given, the president of the bank sent this letter to William T. Pratt:

“DEAR SIR—I am without any response to call made on you to pay your loan of \$10,000. Unless attended to to-day before 3 P. M. we shall notify the guarantor and proceed to measures for collection.

“Respectfully,

“G. M. HARD, Pt.”

It is not denied this letter referred to the demand note, and that the guarantor was the defendant. The indorser of the note, William T. Pratt, was in New York, and could have been served at any time with process. None was served upon him until November twenty-nine following, and from plaintiff's evidence it does not appear that Mr. Pratt took any special notice of the letter addressed to him by the president, although the latter says he undoubtedly saw William between July and September.

There is an absolute and total failure to furnish any reason or explanation for this omission to commence suit against William from July seventeen to November twenty-nine. It was known, of course, that William was in financial difficulties and that he was not paying his liabilities punctually and as they matured. The letter of the president above set forth shows that he then thought summary measures were needful to collect the note, yet no reason is given, no explanation vouchsafed for this strange and, under the circumstances, most unusual and improper delay.

After process was at length served on William, an answer was interposed for his co-defendant by an attorney on the 7th of January, 1887. From that time until April eighth not

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a step appears to have been taken, but on that day the attorney for the plaintiff awoke to the fact that the answer was frivolous, and, therefore, noticed a motion for judgment, and before the motion was heard the answer was withdrawn, and on the same day, April 15, 1887, judgment was entered. Nine months were thus consumed after the plaintiff, by its own admission, assumed there was a necessity for legal proceedings, in obtaining judgment upon a promissory note to which there was no defense, four months before the commencement of the action and nearly five months thereafter. No explanation or excuse is even suggested for this omission to make any move in the suit after the service of the answer, January seventh, until April 8, 1887.

A frivolous answer has been stated to be one which upon mere inspection and without argument the court can see sets up no defense. If it require argument and some examination to detect its insufficiency it is not frivolous, although it might be held bad on demurrer. The attorney for the defendant who put in the answer confessed by his action there was no defense to a motion for judgment on account of the frivolousness of his pleading.

The learned trial judge left the question to the jury to say whether upon the whole evidence there had been a due and reasonable prosecution of the debtor. The counsel for the defendant excepted to this course and duly moved for a nonsuit, which was denied and an exception taken. If upon the evidence in the case this question were one for the jury, the defendant is concluded by the verdict, but if it were one for the court, we have a right to review the decision of the learned courts upon the question. At this very term we have had occasion to examine the point as to when a question of this nature is one for the court and when it is for the jury to decide under instructions from the court. (*Salt Springs National Bank of Syracuse v. Sloan.*)*

It is unnecessary to again go over that ground. It is enough to say that in this case we think the question was solely

*Ante, page 871.

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one of law. The case is barren of any fact occurring subsequent to July 17, 1886, up to the entry of judgment in April, 1887, upon which any justification or excuse can be founded for the otherwise plain failure to commence an action with due diligence, or to prosecute it therewith after it was commenced. While we do not say that after an action has been commenced each step in the prosecution thereof must be taken with the greatest possible diligence and that the attorney who has charge of it must resort to all the known means by which its prosecution might in any event be quickened, we do say that this case is plainly one where no due diligence was exhibited at any time before the 8th of April, 1887.

In the absence of any explanation it is not due diligence to permit a frivolous answer to an ordinary action on a promissory note against a debtor in failing circumstances to remain on the record for three months, during which time not a step of any nature is taken in the action. And, unexplained, it is not due diligence in the commencement of an action to wait over four months after the time when the necessity for its commencement has arisen, before issuing process against, and serving it upon a failing debtor in the same city, whose whereabouts are known and who is not concealing himself to avoid process.

Such facts being given, the inference of a lack of diligence is one which ought as matter of law to flow therefrom, and no jury should be permitted in that case to absolve a plaintiff from the effect of his own unexplained and unexcused neglect.

The difference between the facts of this case and those which are set forth in the case above cited, is so great that the most careless can see and appreciate it, and can, therefore, account for the difference in the results arrived at.

In this case we think the courts below erred in leaving the question of due diligence to the jury, and the judgment should, therefore, be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

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135 430
136 630THE COLUMBUS WATCH COMPANY et al., Appellants, v.
ANTHONY J. G. HODENPYL et al., Respondents.

Where a judgment is entered for a debt justly due and owing, the fact that it was entered upon an offer to allow it, does not render it collusive in any sense which allows another creditor to interfere.

In an action, by another creditor, to set aside such a judgment as fraudulent, the burden is upon plaintiff to show that the indebtedness did not exist and defendant is not called upon to establish its existence or *bona fides* until it has been impeached.

One member of a firm died leaving a will by which he directed his executors to "conduct his interest in the business" in the firm name in conjunction with the surviving partner; the business was so carried on. Subsequently judgments were recovered against the firm and executions issued thereon. In an action by other creditors, among other things, to set aside said executions, *held*, that the provisions of the Code of Civil Procedure in relation to the issuing of executions against executors did not apply (§§ 1731, 1825, 1826), that as to the fund belonging to the estate, left under the directions of the will invested in the business, the executors became copartners and the debts incurred in the business were claims upon the partnership primarily and not upon the testator's general estate; and that the creditors dealing with the new partnership had the usual rights of partnership creditors.

Willis v. Sharp (118 N. Y. 586), distinguished.

Also *held*, that said provisions did not apply to executions issued upon judgments against the firm which were rendered upon debts originally owing by the old firm, but which had, with the consent of the judgment creditors, been assumed by the new firm.

Reported below, 61 Hun, 557.

(Submitted June 16, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 14, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Franklin Bien for appellants. This action is brought by attaching creditors against judgment creditors, both having a lien on the same property. Plaintiffs claim the liens of defend-

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ants by reason of their judgments and executions to be fraudulent and obstructions in the way of plaintiffs' liens. The action is maintainable. (*Bates v. Plonsky*, 28 Hun, 112; *Keller v. Payne*, 22 Abb. [N. C.] 352; *Tannenbaum v. Rosswog*, 22 id. 352.) The validity of plaintiffs' attachments could not be passed upon in this action. (*Skinnion v. Kelly*, 18 N. Y. 355.) An executor or executrix has no power to confess judgments. If offers of judgment are made to avoid the provisions relative to confessions of judgment they are fraudulent. (*Ross v. Bridge*, 24 How. Pr. 163; Code Civ. Pro. § 738.) The executions issued on these judgments are null and void and contrary to the Code of Civil Procedure. (Code Civ. Pro. §§ 1371, 1825, 1826; *Syms v. Mayor, etc.*, 105 N. Y. 159.) An estate can carry on business. (*Burwell v. Mandeville*, 2 How. [U. S.] 559.) An attachment may issue against an executor. (*In re Hurd*, 9 Wend. 465.)

Daniel P. Hays and *Samuel Greenbaum* for respondents. The petitioner who applied for the revocation of the letters and who was a merchandise creditor, standing exactly in the same position as the judgment creditors and the plaintiffs in this action, was not a creditor of the estate of Joseph Stern, deceased, and therefore could not make the application. (*Willis v. Sharp*, 113 N. Y. 586; 115 id. 396.) The estate of the deceased will, under no circumstances, be liable for the debts contracted by the executors, unless the will clearly shows an intention on the part of the testator to charge his estate for any liability of the executor while so conducting such business, and only such part of the assets as are embarked in the business by the executor can be made liable for the payment of debts incurred by the executor in the management of such business. (*Stewart v. Robinson*, 115 N. Y. 328; *Williams v. Whedon*, 109 id. 333; *Loeschick v. Hatfield*, 51 id. 660; *Cushman v. Addison*, 52 id. 628; *Emerson v. Senter*, 118 U. S. 3; *Haynes v. Brooks*, 42 Hun, 528; *In re Hurd*, 9 Wend. 465; *Metcalf v. Clark*, 41 Barb. 47.) The judgments sought to be set aside are not entered against

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the defendants Stern & Stern in their representative capacity, and the insertion of the words "executor" and "executrix" in the title of the action after two of the names is merely *descriptio personæ*. (*Stewart v. Robinson*, 115 N. Y. 334; *Beers v. Squire*, 73 id. 297; *Donohue v. Kendall*, 18 J. & S. 388; *Nerill v. Seaman*, 6 N. Y. 168; *Sheldon v. Hoy*, 11 How. Pr. 14.)

GRAY, J. The plaintiffs were creditors of the firm of Stern & Stern, in New York city, and had procured attachments to be issued upon their claims as set forth in their several actions. They then brought this action for equitable relief, seeking to set aside certain judgments recovered against Stern & Stern and the executions issued thereon against the property attached, and to restrain the sheriff from paying the executions until they, these plaintiffs, could perfect judgments in their other actions. The grounds upon which plaintiffs base their right to such equitable relief are a fraudulent collusion in obtaining the judgments and the nullity of the executions, for being issued against executors in contravention of the requirements of the provisions of the Code of Civil Procedure. In 1886, Joseph Stern, a member of the firm of Stern & Stern, died; leaving a will, whereby he constituted his widow, the defendant, Dinah Stern, and his partner, the defendant, Simon Stern, the executors of his estate; and therein authorized them "to conduct his interest in the business then carried on by him under the firm name of Stern & Stern, in conjunction with his brother, in such manner as they should deem proper and for such time as they should deem for the interest of his estate." Thereafter the business of the testator's firm was carried on by the surviving partner and Joseph Stern's executors until November 29, 1889. On that date the judgments complained of were recovered against the firm of Stern & Stern and executions thereon issued to the sheriff. The trial judge found that each of the judgments was for a debt justly owing by the firm to the party or parties in whose favor the judgment was entered; and nothing which is pointed out by the appellant's

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counsel would warrant us in saying that the findings were not justified. Indeed, their counsel bases his attacks upon the judgments, upon inferences from the methods in which the judgments were recovered, rather than upon anything which amounts to evidence affecting the *bona fides* of the claims of the judgment creditors.

They were entered upon offers made by the defendant firm to allow judgment to be taken for the amount claimed, and, of course, in such a sense, they might be called collusive; but, if made to secure the payment of a just indebtedness, the offer to allow judgment to be entered is not a collusion which violates any rule of law, or gives the right to another and less fortunate creditor to interfere. The existence of some other purpose must be shown, which involves the commission of a fraud or a legal injustice upon creditors, to render fraudulently collusive the preference permitted to a creditor in allowing an immediate entry of judgment in his suit. The judgments were all for goods sold and delivered to the firm, with the exception of three, which were for moneys loaned to the firm. These latter judgments were recovered by relatives and they are particularly the subject of attack.

I see no good reason, nor is any advanced, for disturbing the conclusions reached by the learned justices at the Special and General Terms. There was some evidence to support the finding as to the *bona fides* of the indebtedness, and there was no proof affirmatively establishing, or even tending to establish, on the plaintiff's part, that the judgments were for fraudulent or non-existent demands. The courts below have drawn their inferences from the testimony given by defendants with respect to the judgments, and we cannot and should not disturb them.

I think, too, that the General Term justices correctly held the burden to have been upon the plaintiffs to show that there was no such indebtedness, and that it was not incumbent upon the defendants to establish its existence, or *bona fides*, until it had been impeached.

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The appellants say that the executions issued upon the judgments of the defendants were null and void, and cite section 1731 of the Code, which provides that an execution upon a judgment for a sum of money against an executor is regulated by sections 1825 and 1826 of the Code. Those sections provide that the surrogate in such a case must permit the execution to issue by an order, and for the giving of a notice of six days. The judgments, however, were not against the estate of the deceased partner and were not within these Code provisions. They were upon debts owing by the firm of Stern & Stern and the executions were not issued against the defendants, who were executors of Joseph Stern, the deceased partner, as such executors. They were partners in the business and in affixing to the names of Simon Stern and Dinah Stern the words executor and executrix, they were used as descriptive merely of the persons. As executors they were not interested in the business of the firm, otherwise than as the will authorized them to take part in it. The interest in that business, which testator had at the time of his decease, was continued by his executors, and his general estate was not engaged. The claims of the judgment creditors were contracted either upon loans to, or in the course of business with the firm of Stern & Stern, and what was subjected to the hazards of that business was the particular part of the testator's estate invested in his firm's business.

As to such a fund, the executors became copartners and the debts incurred in the business were claims upon the partnership primarily, and not upon the testator's estate.

This will differs from that in *Willis v. Sharp* (113 N. Y. 586), in that here the testator did not subject his general assets to the hazards of the business; while there the language of the will was so general, as to the powers conferred upon the executors to dispose of the whole estate in the conduct of the business, as to bind the general estate of the testatrix for the business debts. The right of executors to continue a business, in which their testator had been engaged, has been the subject of much consideration by the courts and the rules of

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construction as to the powers of executors, in such cases, are well settled. They derive those powers not from their office, but by virtue of the authority in the will. Such an authority must be explicitly found and the language of the will must be resorted to, when a question arises as to the nature of the liability which is incurred in the conduct of a business by executors. The question was carefully reviewed in *Willis v. Sharp* (*supra*) by Judge ANDREWS and the present case presents no occasion for a further discussion. The direction to the executors in Joseph Stern's will was explicit enough and nothing appears in the case warranting any other conclusion than that his executors, with respect to the business of Stern & Stern, subjected to its risks only that part of the estate which their testator had left invested in it and gave to creditors dealing with the new partnership the usual rights of partnership creditors.

The claim of appellants that certain of the judgments were for loans made in the lifetime of Joseph Stern, the deceased partner, and that, therefore, resort could only have been had to his executors, is untenable.

In the one case, a legacy was due to a daughter from her father's estate; but she let it remain in the business, drawing interest upon it. She thereby waived her right to insist upon its payment out of the estate and elected to become a creditor of the firm and being such a creditor she had the right to pursue her remedy against the firm assets, for the recovery of the money loaned. In the other case, a loan had been made to the old firm, which was continued with the firm formed upon Joseph's death, and which was reduced in amount, from time to time, by payments by the new firm. For the balance due in 1889, she held the firm's note, which was placed in judgment. She had thus become a creditor of the firm, and, as such, entitled to proceed by judgment and execution in the ordinary way. As all the claims put in judgment were upon an indebtedness of the partnership, the provisions of the Code, relied upon by the appellants, did not apply; as they undoubtedly would have, had the judgments, to collect which the execu-

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tions were issued, been recovered upon claims against the estate of the deceased testator.

These views are, in substance, those stated by the learned justice who spoke for the General Term, and, as the other questions are sufficiently answered in his opinion, I think the judgment appealed from should be affirmed by us, with costs.

All concur.

Judgment affirmed.

WILLIAM GARRATT, Appellant, v. THE TRUSTEES OF THE
VILLAGE OF CANANDAIGUA, Respondent.

Under the provisions of the act of 1886 (Chap. 658, Laws of 1886) authorizing the trustees of the village of Canandaigua to construct a public sewer along the bed of the outlet of Canandaigua lake, the plan and details of the work were left to the judgment and discretion of the trustees, and although the plan adopted was faulty and a better one might have been devised they may not be made responsible for the results.

So, also, where it turns out that a person assessed for benefits was not in fact benefited as much as was anticipated, this does not give him a cause of action against the trustees.

Public officers or a municipality charged with the conduct of a work of public improvement, where they have acted in good faith and are not chargeable with any neglect, default or unlawful act, are not responsible to a property-owner because the work has not resulted in such benefits to him as were anticipated, or because it does not answer all the purposes for which it was projected.

As the commissioners appointed under said act had jurisdiction to make the assessments and a person assessed was given an opportunity for a hearing before them, and also to review the assessments, the conclusive presumption in an independent action is that the assessment was fair and based upon a proper adjustment of the benefits conferred and the burdens imposed; at least where it is not claimed that the improvement was not in some degree beneficial to the property of such person.

The trustees in prosecuting the work caused to be erected gates by which to regulate the flow of water from the lake. In an action, among other things, to compel said trustees to so use the gates as to diminish the flow of water through the same and to prevent its overflow on plaintiff's land, it did not appear that more water was allowed to pass through the outlet from the lake since, than before the improvement, or that the improvement or the use of the gates increased the flow of water on plain-

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tiff's land, but simply that the improvement did not have the anticipated effect of completely draining overflowed lands. *Held*, that in the absence of any evidence that defendant had neglected any duty, either in the construction of the gates or the manner of operating them, or had done any unlawful act, the action was not maintainable; that the regulation of the quantity of water passing through the gates was committed, in a great measure, to the discretion of the trustees, and they were under no legal obligation to favor the plaintiff.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1891, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from permitting the waters of Canandaigua lake to overflow plaintiff's land and for damages.

The facts, so far as material, are stated in the opinion.

Henry M. Field for appellant. The plaintiff was entitled to judgment in this action, that a perpetual injunction be granted. (Laws of 1886, chap. 658; *Corning v. T. I. Co.*, 40 N. Y. 7; *Mudge v. Salisbury*, 110 id. 413; *Galway v. M. E. R. Co.*, 128 id. 148.) The respondent now owning the property of the Ontario Hydraulic Company (Chap. 237 of the Laws of 1855) is under the same liability as said Hydraulic Company. (Dillon on Mun. Corp. § 985.) The grant given to the village by the legislature became a contract with the appellant to complete and carry out the same. (*Gilmore v. City of Utica*, 121 N. Y. 561, 568; *People v. Bd. Suprs.*, 51 id. 50; *People v. Bd. Suprs.*, 68 id. 114; *Conrad v. Trustees, etc.*, 16 id. 158.) The respondent having initiated the proceedings under the act of the legislature and having taken possession of the feeder, built the bulkheads, etc., should be held to have accepted the authority given to it by the legislature, subject to all the burdens and liabilities. (*Bailey v. Mayor, etc.*, 3 Hill. 531.) The appellant is entitled to maintain this action, and

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to the relief asked for in the prayer of the complaint, whether the plan of sewerage was defective or not. (*Baily v. Mayor, etc.*, 3 Hill. 531; *Mayor, etc., Furze*, Id. 612; *Hutson v. Mayor, etc.*, 5 Seld. 163; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Butler v. Vil. of Edgewater*, 25 N. Y. S. R. 315; *Stoddard v. Vil. of Saratoga Springs*, 22 id. 215; *Noonan v. City of Albany*, 79 N. Y. 470; Wood on Nuisances, § 752; Dillon on Mun. Corp. § 1051; *Hardy v. City of Brooklyn*, 90 N. Y. 435; *Morgan v. City of Binghamton*, 32 Hun, 602; *Bates v. Inhabitants of Westborough*, 151 Mass. 174.) The village now owns the feeder the bulkheads and the gate, and has the absolute right to control them and should be required to regulate the gate and the waters flowing through it so as not to destroy appellant's land. (*Vogel v. Mayor, etc.*, 92 N. Y. 19.) The acts of defendant amount to a nuisance, and in such case the court will grant an injunction to restrain it in continuing the same. (*Cogswell v. N. Y. C. & H. R. R. Co.*, 103 N. Y. 21; *Baily v. Mayor, etc.*, 3 Hill. 531; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Noonan v. City of Albany*, 79 id. 470; *Seifert v. City of Brooklyn*, 101 id. 136; *In re B. & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Spokes v. Branbury Board of Health*, L. R. [1 Equity] 41; *Hooker v. City of Rochester*, 37 Hun, 181; *Tiffany v. U. S. I. Co.*, 67 How. [U. S.] 73; *Gould v. City of Rochester*, 105 N. Y. 46; *Chapman v. City of Rochester*, 23 Wkly. Dig. 424; *Vick v. City of Rochester*, 46 Hun, 607; *Lynch v. Mayor, etc.*, 76 N. Y. 60; *Mayor v. Furze*, 3 Hill. 612; *Hutson v. Mayor*, 5 Seld. 163; *Mills v. City of Brooklyn*, 32 N. Y. 489.) The appellant has helped to pay for the property, which is useful and valuable to the defendant, it has exclusive control over the gate, and the court should use all its equitable powers to sustain plaintiff's rights, and protect his property. (*Fletcher v. Rylands*, L. R. [1 Exch.] 2; *G. L. & C. Co. v. Vestry, etc.*, L. R. [15 Q. B.] 1.) The court erred in sustaining the objection of defendant as to question asked the witness Ellis. (*Adams v. Conover*, 87 N. Y. 422.)

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Edwin Hicks for respondent. The plaintiff cannot recover under the provisions of chapter 658 of the Laws of 1886. (*Johnson v. Spear*, 107 N. Y. 185; *In re N. Y. E. R. R. Co.*, 70 id. 350; *People v. Hills*, 35 id. 499; *People v. Allen*, 42 id. 378; *Huler v. People*, 49 id. 132; *People v. Suprs.*, 43 id. 10; *People v. Purdy*, 54 id. 276.) The corporation is not estopped from raising this objection by the action of its board of trustees. (*Mayor, etc., v. Cunliff*, 2 N. Y. 165.) The plaintiff is not entitled to an injunction in this action upon the merits. (*Major v. Mersevole*, 26 Wend. 131; *Moore v. Saundly*, 6 Johns. Ch. 28; *Thompson v. Mather*, 2 Edw. Ch. 212; *T. & B. R. R. Co. v. B. H. T. & W. Co.*, 86 N. Y. 122; *Stevens v. Major*, 84 id. 296; *Mann v. Fairchilds*, 2 Keyes, 111; *Arnold v. Angell*, 62 N. Y. 508; *Gentil v. Armand*, 38 How. Pr. 94; *Morgan v. City of Binghamton*, 102 N. Y. 500; *Woodruff v. Fisher*, 17 Barb. 224.) This plaintiff, being a party to the proceedings, having appeared before the commissioners, and having taken the award for damages, and not having appealed from their decision in regard to the benefits, is estopped thereby, as well as by the action and decision of the commissioners in making their award, and cannot maintain this action, which is at most only an incidental injury, if it is an injury at all. (*In re P. P. & C. I. R. R. Co.*, 85 N. Y. 489, 499; *R. & S. R. R. Co. v. Budding*, 6 How. Pr. 467, 469; *Pray v. Hegeman*, 98 N. Y. 351; *In re Commissioners of Central Park*, 50 id. 493; *DePeyster v. Mali*, 92 id. 262.) Whatever control the defendant may have it is subjected to special limitations independent of the general rule controlling the flow of water. (Laws of 1855, chap. 234, § 1; Laws of 1886, chap. 658, § 1.) The action on the part of the defendant which is complained of is in the prosecution of a public work authorized by the law of 1886, and so considered the plaintiff's case must fail. (*Webb v. Atherson*, 4 Barb. 51; *Richardson v. Crandall*, 48 N. Y. 361; *Winter v. Kinney*, 1 id. 365.) No action will lie against the defendant for consequential or other injury resulting from the work, or for inadequacy of the plan adopted to carry out

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successfully the entire object. (*Wagoner v. German*, 3 Hill, 375; *Atwater v. Trustees, etc.*, 30 N. Y. S. R. 587; *Ely v. City of Rochester*, 26 Barb. 133; *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Kavanah v. City of Brooklyn*, 38 Barb. 232; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Hines v. City of Lockport*, 50 id. 236; *Mills v. City of Brooklyn*, 32 id. 489; *Mills v. Mayor, etc.*, 1 Den. 595; *E. R. C. Co. v. Donnelly*, 25 Hun, 614; *Cain v. City of Syracuse*, 29 id. 105; 95 N. Y. 83; *Town of Ontario v. Hill*, 29 Hun, 250-253; *City of Detroit v. Beekman*, 22 Am. Rep. 507; *Lansing v. Toolan*, Id. 501; *Carr v. Northern Liberties*, 35 Penn. St. 324-329; *Watson v. City of Kingston*, 114 N. Y. 88; *Rutherford v. Village of Holly*, 105 id. 632; *Heiser v. Mayor, etc.*, 104 id. 68; *In re Squire*, 34 N. Y. S. R. 721.) The rulings made on the questions put to the witnesses F. L. Manning and Bolivar Ellis were proper. (*Brooks v. Mayor, etc.*, 57 Hun, 104; *Green v. Clark*, 5 Den. 49; *Morgan v. Plumb*, 9 Wend. 288; *Thomas v. Hubble*, 18 Barb. 9-10.) In an equity action the court will not reverse the judgment on account of the admission of improper evidence, if from the whole case it appears that such evidence could not have changed the result. (*King v. Whaling*, 59 Barb. 71; *In re N. Y. C. R. R. Co.*, 90 N. Y. 342.)

O'BRIEN, J. By chapter 658 of the Laws of 1886, the trustees of the village of Canandaigua were authorized to raise money and to take and appropriate lands for the purpose of constructing a system of drainage and sewerage for the village and also for the purpose of reclaiming wet and swamp lands in two of the adjoining towns. The act provided for the appointment of commissioners by the County Court to determine and award the damages sustained by any property owner whose lands were taken or injuriously affected by the improvement, and also to assess such portion of the expense of making the improvement upon the property benefited by the drainage in proportion to such benefits as would be just. The award of damages and the assessment for benefits were both subject to

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revision by the commissioners upon a rehearing and to a further examination upon appeal to the County Court. The plaintiff was awarded damages in the sum of \$156.36 and assessed, on account of benefits supposed to follow from the improvement, \$800. It does not appear that he raised any question with respect to the amount of the assessment before the commissioners or appealed to the County Court. The plaintiff's general complaint is that while he was assessed and has paid a large sum as his contribution to the expense of the work contemplated by the statute, his lands have not been drained or reclaimed to the extent anticipated. The plaintiff's grievance really grows out of what to him appears to be an improper exercise of the sovereign power of taxation delegated by the legislature to the officers and bodies designated in the statute. The main object of the enactment was to enable the authorities of the village to improve the sewerage system, one of the ordinary public objects for which municipal burdens are imposed. It appears that something over \$26,000 was expended for the purpose and of this nearly \$23,000 was assessed upon the village at large. The plan that was finally adopted and carried out by the trustees was to dispose of the sewage through the outlet of the lake and what is called the feeder to this outlet, and this required the removal of certain obstructions in the stream, which constituted the outlet, in order to produce a more rapid flow of the water. One of these obstructions was a dam across the outlet, some four miles from the foot of the lake, which had been maintained for many years for manufacturing purposes. The power of eminent domain also delegated by the statute, was used to remove this dam, involving as it did, the obligation to make compensation, in comparatively a large sum, to the owner which was paid. The balance of the work in cleaning out the stream consisted mostly in the removal of bars and other obstacles to a free flow of the water, and in dredging and deepening the channel in some places. The statute contemplated that the removal of these obstructions would inure to

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the benefit of the owners of land along the outlet and near the foot of the lake, which had been before subject to overflow, and hence power was conferred upon the commissioners to charge some part of the expense upon these lands upon the basis of the benefits conferred. What the plaintiff complains of is that this power has been so exercised as to impose upon him a considerable burden without conferring all the benefits contemplated when it was imposed and paid. The learned trial judge who was evidently somewhat impressed with the merits of the plaintiff's claim, has not found that the removal of the obstructions in the outlet is not in some degree beneficial to the plaintiff's farm, but he has found that the removal of the obstructions and cleaning out of the feeder and outlet and taking down of the dam, have not drawn off the water from the plaintiff's land *to the extent that they expected* and that they are still overflowed and unfit for cultivation to a very great extent. He also finds that since the completion of the improvement the rainfall in the locality has been unusually heavy and that it does not appear precisely to what extent the land of the plaintiff would be free from water in ordinary times and under ordinary circumstances, but that it was expected when the plan for cleaning the outlet was adopted, it would, when carried out, sufficiently drain plaintiff's lands to enable him to till them. It must be admitted that the trustees and the commissioners had under the statute power and jurisdiction to make the improvement and to impose the assessment. How the improvement in the drainage of the village was to be secured and how the wet lands along the outlet were to be reclaimed was left by the legislature, in a great measure, to the discretion and judgment of the village authorities. The statute does not prescribe the plan or details of the work by means of which the end was to be accomplished. That was left to the judgment of the trustees and, even though the plan that was adopted was faulty and a much better plan might have been devised, still as they acted in good faith, they could not be made responsible for the results or consequences of an erroneous judgment in that

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regard. (*Hines v. City of Lockport*, 50 N. Y. 236; *Urquhart v. City of Ogdensburg*, 91 id. 67.)

The power to drain the lands near the village might have been conferred by the legislature for public purposes, to promote health or the like, and whether that was the motive that prompted the enactment of the statute, or some private interest is not now important. Jurisdiction was conferred upon the commissioners, with respect to assessments upon the lands along the outlet, for benefits to result from the drainage, subject to appeal by any party aggrieved to the County Court. If it be said that the plaintiff ought not to have been assessed at all or that he has been assessed for too large a sum, the answer is that upon this question he has had his day in court. He could have appeared before the commissioners and by evidence or argument satisfied them that the proposed plan would not, when carried out, result in reclaiming any of his wet lands, or certainly not to such an extent as to warrant the imposition upon him of so large a burden. He was entitled to a hearing and to show if he could that the improvement proposed would not result in any benefit to him, and to insist that until some plan was formulated upon the basis of which the work was to be done, that would result in draining his lands no assessment should be imposed upon him. He had as good an opportunity of forming an opinion as to the effect on his wet lands, of the improvement proposed as the trustees. He had the right to object to any assessment until the commissioners were convinced that what was proposed, with respect to clearing out the feeder and outlet, would result in improving his lands to the extent of the assessment proposed. In case the commissioners proceeded upon erroneous principles, or upon a basis that furnished no reasonable ground for the belief that any benefit to the plaintiff's property would follow from the work proposed, or for any other valid reason, based upon the facts or the law, the plaintiff was entitled to a further hearing in the county court. As the plaintiff neither objected nor appealed but allowed the award and assessment to be confirmed, we must assume that he, like

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the trustees who had been intrusted with the duty of formulating and executing a proper plan for the improvement, anticipated results from what was proposed which have not been fully realized. That consideration, however, would not justify this court in assuming that the assessment was either erroneous or excessive as a ground for some liability against the defendant in this action. All that we can know now, in regard to the assessment, is that there was jurisdiction to make it an ample opportunity to review it if erroneous, and that there is no finding or request to find that the improvement was not, in some degree at least, beneficial to the plaintiff's property. Under such circumstances it must be presumed, in an independent action like this, that the assessment was fair and based upon a proper adjustment of the benefits conferred and the burden imposed. The part of the plaintiff's case, that perhaps is urged with most earnestness, is the fact found that the trustees caused to be erected at the head of what is called a feeder, or large artificial channel through which the water flows from the lake into the outlet, and near the place where gates had formerly existed, to control the flow of water, a bridge and gates by means of which they are enabled to control the flow of water from the lake as they may desire. The rights and privileges conferred by the statute were to be exercised in such a way that the waters of the lake should be maintained at a height not less than the ordinary height of such waters at low-water mark. To this end the trustees were by the last section of the act authorized to erect and maintain in the outlet of the lake, and in this new channel for said outlet, locks or bulkheads with gates and by such and other adequate means, to so control and regulate the discharge of the waters as to fully comply with the provisions of the act. The plaintiff complains that the trustees do not keep this gate closed, but on the contrary wide open and permit water to flow through it into the outlet to such an extent as to overflow his lands. There is no question with respect to the power of the trustees to erect and maintain the gate and control the flow of the water. The plaintiff's claim seems to

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be that this power should be exercised in such a way as to lessen the flow of water in the outlet and thus relieve his lands. The bed of the outlet is the sewer through which the sewage from the village was to be carried away, and when improved in the manner contemplated by the statute, was to be and remain the property of the city. The defendants are, therefore, using the gate to regulate the flow of the water from the lake into the sewer, and how much or how little they shall allow to pass through the gate is a matter that, from the nature of the case, must, to a great extent at least, rest in their discretion. It is not alleged or found, and there is no request to find, that the defendants have omitted any duty that they owe to the plaintiff, with respect to the construction of the gates, or the manner of their operation. It is not found, and there is no request to find, that in any of these particulars the defendants or their predecessors have been guilty of any negligent or unlawful act. Nor is there any finding or request that more water is allowed to pass through the outlet from the lake since than before the improvement, or any other act done on the part of the defendants in making the improvement or in using the gates which increases the overflow of water on the plaintiff's lands. It may very well be that the defendants in using the gates could favor the plaintiff by shutting off the flow of water through the outlet, but we are unable to find anything in the case to warrant us in holding that they are under any legal duty or obligation to do so. The statute does not seem to have contemplated that the improvement provided for was to lessen the flow of water into the outlet from the lake, but to furnish facilities by removing the dam and other obstructions, for a more free and rapid flow of the water. The dam and other obstructions in the outlet were supposed to cause the overflow and when removed it was expected the lands would be reclaimed. That these expectations have not been fully realized, is perhaps, to be attributed more to the fact that sufficient money or labor was not expended in the work of removing the obstructions and deepening and adding to the capacity of the outlet, rather

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than to any mismanagement or defect in the plan. What has been done seems to have been well enough directed, but the operations did not go far enough for the purpose of completely draining and reclaiming the overflowed lands. It is the case of an improvement undertaken and carried on partially at the expense of local property owners which, in the end, did not confer upon them all the benefits that had been anticipated, but which result, so far as appears, is not chargeable to any wrong or negligence on the part of defendants. Public officers or a municipality charged with the conduct of such a work are not responsible to a property owner because the work has not resulted in such benefits and advantages to him as were anticipated, or because it does not answer all the purposes for which it was originally projected, when the authorities have acted in good faith and are not chargeable with any neglect, default or unlawful act on their part. To enjoin the defendants from regulating the flow of the water through the gates in their own way and according to their best judgment, and to require them to exclude, by the use of the gate, all water from the lake that may overflow the plaintiff's lands, would be to deprive them of all discretion when, so far as appears, their action in regard to it is not unlawful, malicious or negligent. The action was not, therefore, sustained, and the complaint was properly dismissed. We have examined the rulings and other questions in the case to which our attention has been called, and we find no error that would justify a new trial.

The judgment should, therefore, be affirmed with costs.

Ali concur.

Judgment affirmed.

Statement of case.

THE PEOPLE ex rel. EBENEZER G. BLAKSLEE, Appellant, v.
THE COMMISSIONERS OF THE LAND OFFICE, Respondents.

135	447
144	88
135	447
157	580

A party not the owner of adjoining uplands and having no grant of lands under the waters of a navigable river, and who, therefore, is not aggrieved by a decision of the commissioners of the land office granting said lands, is not entitled to a review by certiorari of the action of the commissioners.

An exception or reservation, in a deed of uplands adjoining the Hudson river, of the water rights, privileges and grants appertaining to the land conveyed is wholly ineffectual where the grantor had, at the time of the conveyance, no grant from the state or title to the lands under water, and the grantor retains nothing which he can thereafter convey.

The fact that the grantor had previous to the conveyance, without any right, entered upon and filled up the land under water, gives him no title, and he did not thereby become a proprietor of "adjacent lands," within the meaning of the statutes controlling grants by said commissioners (1 R. S. 208, § 67); as between him and the state the land so filled in remains land under water.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 12, 1891, which affirmed proceedings of the commissioners of the land office granting land under water of the Hudson river to the E. G. Blakslee Manufacturing Company.

The facts, so far as material, are stated in the opinion.

Francis Larkin for appellant. The E. G. Blakslee Manufacturing Company's lot of land No. 1 gave them no riparian rights whatever. It did not make them the adjacent proprietor of any upland. (1 R. S. [7th ed.] 573, § 67.) The E. G. Blakslee Manufacturing Company was not the proprietor of the adjacent lands by reason of being the owner of lot No. 2, called the Jones lot, and, therefore, the grant to them is void. (*People v. Colgate*, 67 N. Y. 512; *People ex rel. v. Jones*, 112 id. 597.) If the exception and reservation in the deed to Gregory and Mead had not taken away from them all riparian rights, and they had been the adjacent proprietors of the

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upland, the grant to the E. G. Blakslee Manufacturing Company was as much again as they were entitled to, and is void, and should be reversed on that account. (*People v. Schermerhorn*, 19 Barb. 540; *K. I. Co. v. Schultz*, 116 N. Y. 382.)

Alfred Taylor for respondents. The title, or rather the invalidity of the claim of title by the relator, under the exception and reservation of the deed of Daniel Quimby, has already been decided by this court, and is settled beyond further controversy. (129 N. Y. 158; *People v. N. Y. & S. I. F. Co.*, 68 id. 71; *Gould v. H. R. R. Co.*, 6 id. 522.) The fact that the Hudson River railroad runs in front of the premises does not impair the riparian rights of the company. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 114 N. Y. 423.) The relator, E. G. Blakslee, is not "a person aggrieved by the determination to be reviewed," and has no standing in court to review the proceedings of the commissioners. (Code Civ. Pro. § 2127; *People ex rel. v. Mayor, etc.*, 5 Barb. 43; *Cotton v. Blaz*, 12 Wend. 234; *People ex rel. v. Coleman*, 41 Hun, 344.)

EARL, Ch. J. The E. G. Blakeslee Manufacturing Company made application to the commissioners of the land office for a grant of certain land under the water of the Hudson river, and based its application on the ground that it was the owner of the adjacent upland, and the grant was made. The relator then instituted this proceeding by certiorari to review and reverse the action of the commissioners on the ground that the grant was made in violation of the Revised Statutes, which give the commissioners power to make such grants, but provide that "no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void." (1 R. S. 573 [7th ed.].) The relator claims that the company was not the proprietor of the adjacent land, and that even if it was the proprietor of any, it was not to the extent in width of the land granted.

The matter was very carefully and thoroughly examined and investigated by the commissioners of the land office, and

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it is very difficult, if not impossible, upon this record in which the facts are not plainly presented, to determine whether or not they erred as to the ownership of all the adjacent land by the company.

It is sufficient for the present purpose that the relator was not the owner of the adjacent land, or of the land granted, and that thus he was in no way aggrieved by the determination of the commissioners. Even if the grant to the company was void, he was in no condition to complain of it.

It is a cardinal principle, as applicable to proceedings by certiorari as to other legal proceedings, that a party cannot be heard in court who has no interest in the matter pending, nor can he appeal from a determination by which he is in no way aggrieved. (Code, § 2127; *Colden v. Botts*, 12 Wend. 234; *Ex parte Mayor of Albany*, 23 id. 277; *People ex rel. Moore v. Mayor of New York*, 5 Barb. 43; *People ex rel. Merchants' National Bank v. Coleman et al., Commissioners of Taxes*, 41 Hun, 344.)

There is no pretense that the relator is the proprietor of any of the adjacent upland. Reuben Quimby formerly owned all the adjacent land, and his title thereto by several mesne conveyances came to the company. He conveyed the land by two deeds in 1853. In the first deed he conveyed what is called in the record parcel one. That is an absolute deed without any reservation or exception. In the other deed he conveyed parcel two, and that deed contains this clause: "Containing all the land within said boundaries, excepting and reserving to said Quimby, his heirs and assigns, all the water rights and privileges, and all the water grants and rights in the Hudson river west of the said railroad, which now do or hereafter may appertain or belong to the above-described premises, the same and in the same manner as if these presents had not been made." Quimby owned no land under water, had no grant from the state, and was simply an owner of the adjacent upland which he granted. The relator has succeeded to whatever rights or interests Quimby was able to convey by virtue of the clause above quoted, and we have held that that

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clause was wholly ineffectual, and that by virtue of it Quimby retained nothing which he could convey. (*E. G. Blakeslee Manufacturing Co. v. E. G. Blakeslee's Sons Iron Works*, 129 N. Y. 157.) The relator, therefore, derived no right to or interest in the adjacent land, or the land under water, from Quimby.

But he seems to place some reliance upon other facts. A few years before the grant to the company he, being president of the company, caused the refuse from its foundries to be deposited in the water west of the railroad, upon some of the land under water subsequently granted to the company, and by this deposit the land was raised above the water. He certainly acquired no title to the land by thus entering upon it without any right and filling it up, and he did not thus become the proprietor of the "adjacent lands" within the meaning of the statute above quoted. As between him and the state, it still legally remained land "under water," to be dealt with as such. The grant of the land to the company invaded no rights of his and caused him no legal grievance.

The relator is, therefore, without any standing to maintain this proceeding, and the order appealed from should be affirmed, with costs.

All concur, except MAYNARD, J., not sitting.

Order affirmed.

135 450

150 386

135 450

156 565

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157 599

135 450

168 4307

168 4841

168 4844

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MICHAEL MURPHY, Appellant.

Where evidence, objected to generally, is not in its essential nature incompetent, all grounds of objection which might have been obviated if they had been specifically stated, but which were not so stated, must be deemed to have been waived and may not be raised upon appeal.

Upon a criminal trial, certain anonymous letters were introduced in evidence by the prosecution; for the purpose of showing that they were written by defendant, a number of genuine specimens of his handwriting were put in evidence and experts were called as witnesses who, after a comparison of the letters with such specimens, testified that they were all written by the same hand. Defendant, for the purpose of testing the accuracy of the judgment, submitted different specimens of handwriting

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to said witnesses who, after comparing them with the letters and specimens put in evidence by the people, testified that some of them were written by the same person who wrote the letters. Defendant then offered to prove that the specimens so submitted were not in the handwriting of defendant, but were written by another person; this evidence was excluded. *Held*, no error; that it was collateral matter and defendant was bound by the answers of the witnesses.

First Nat. Bank v. Hyland (53 Hun, 108, affirmed 125 N. Y. 711); *Mut. Life Ins. Co. v. Suiter* (181 N. Y. 557), distinguished.

The indictment was for arson in setting fire to a barn. Defendant had been in the employ of the owner of the burned barn as coachman and gardener and had been discharged. A poisonous preparation had been kept in the barn. Defendant knew of this and had used it for the destruction of insects in the garden. The prosecution was permitted to prove, under objection and exception, that upon the night of the fire, and before it occurred, certain animals in the barn belonging to the owner were poisoned with this preparation; that his carriages and cutters in the barn and an adjoining one were cut and damaged, while carriages and cutters in the same barns belonging to another were not injured. *Held*, that the evidence was competent, as it tended clearly to prove that the fire was not accidental, and that its origin was instigated by malice, also that the fire and the malicious injury were part of the same criminal scheme, and that it was carried out by some person having an intimate knowledge of the surroundings; and so, it was properly received, although it may have tended to establish defendant's guilt of a crime other than the one set forth in the indictment.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department entered upon an order made January 22, 1892, which affirmed a judgment of the Court of Sessions of the county of Niagara convicting defendant of the crime of arson in the third degree entered upon a verdict.

The facts, so far as material, are stated in the opinion.

Richard Crowley for appellant. It was error to receive testimony as to the cutting and mutilation of the carriages, cutter and sleighs of Edward M. Moody and Elisha Moody. (*Coleman v. People*, 55 N. Y. 81; *People v. Dowling*, 84 id. 478; *People v. Gibbs*, 93 id. 470; *Hope v. People*, 83 id.

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418-427.) It was error to exclude the evidence of witness, John Murphy, as to who wrote the nine papers shown all the people's witnesses on handwriting, by defendant's counsel. (*F. N. Bank v. Hyland*, 35 N. Y. S. R. 993; *Dryer v. Brown*, 23 id. 695; *Hardy v. Norton*, 66 Barb. 527.) The evidence of experts on handwriting was incompetent in this case. Evidence by comparison of writings was incompetent, in this state, before the passage of chapter 36, Laws of 1890, amended by chapter 555, Laws of 1888. Those laws relate only to a disputed writing. (*Peck v. Calligan*, 65 N. Y. 73; *People v. DeKroyft*, 49 Hun, 71; *M. L. Ins. Co. v. Luiters*, 14 N. Y. Supp. 346; *McKay v. Lasher*, 50 Hun, 383.)

P. F. King for respondent. It was proper to show that there was ill feeling and unfriendly relations between the defendant and Libbie Black for the purpose of proving motive. (*Pierson v. People*, 79 N. Y. 424; *People v. Stout*, 4 Park. 71; *People v. Kerrains*, 60 N. Y. 221; *People v. Sharpe*, 107 id. 482; Abb. Cr. Brief, § 618; *La Bean v. People*, 34 N. Y. 223.) The letters were properly admitted in evidence, containing threats and inculcating the writer with the crime. (Abb. Cr. Brief, § 673; Best on Ev. § 456; *People v. How*, 2 Wheeler, 415; Lawson on Pres. 511; *Stephens v. People*, 4 Park. 448; *Stokes v. People*, 53 N. Y. 175; *La Bean v. People*, 34 id. 223; *Jefferds v. People*, 5 Park. 522.) The evidence of the burning of the Rehms barn was proper, being connected with the principal transaction and made part thereof. (*Wright v. People*, 1 N. Y. Cr. Rep. 464; *Hope v. People*, 83 N. Y. 418; *Osborne v. People*, 2 Park. 583.) It was not error to refuse to allow the witness, John Murphy, to testify that he wrote some of the papers shown him by defendant's counsel. Only papers purporting to be written by the defendant were admissible or material. (*Peck v. Callaghan*, 95 N. Y. 73; Lawson on Expert Ev. 398; *McKay v. Lasher*, 42 Hun, 270; 31 N. Y. S. R. 690; *Hall v. Van Vrankin*, 28 Hun, 403; *Hilsley v. Palmer*, 32 id. 472; Laws 1880, chap. 30; *Van Wyck v.*

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McIntosh, 14 N. Y. 439.) It was proper to show the cutting and injury to the carriages and cutters and the poisoning of the stock. (*Osborne v. People*, 2 Park. 583; Abb. Cr. Brief, §§ 432, 598; *Weed v. People*, 56 N. Y. 628; *Hope v. People*, 80 id. 427.)

MAYNARD, J. The defendant was convicted of the crime of arson in the third degree. The evidence was purely circumstantial, as it ordinarily is in the proof of this class of crimes. It is unnecessary to review it in detail, but it was sufficient, we think, if believed by the jury, to connect the defendant with the commission of the offense charged and to support their conclusion that he was the perpetrator of it.

On the trial two anonymous letters were introduced in evidence, and undoubtedly had an important bearing in securing defendant's conviction. One was written to a woman in the employ of the owner of the burned building, threatening to burn her house in case she continued in his employment, and requesting her to tell the owner that he would burn his property too if he did not discharge a servant girl with whom the defendant had a standing quarrel. The other letter was written four days after the fire, and was addressed to the owner of the building, and contained an implied threat of further harm unless he did as the writer requested, which, it was argued, had reference to the request in the former letter for the discharge of the servant girl. The prosecution resorted to the method authorized by chapter 36 of the Laws of 1880 in order to prove that these letters were written by the defendant. A number of specimens of his genuine handwriting were put in evidence, and six expert witnesses were called, all of whom, after a comparison of the letters with the specimens shown to have been genuine, testified, with different degrees of positiveness, that the letters and the specimens were all written by the same hand.

It is now objected that this mode of proof of defendant's handwriting was unauthorized; that it was not a case of a disputed writing within the provisions of the act of 1880; that

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the statute was only intended to change the rules of evidence formerly in force when the authenticity of the paper is directly the subject-matter of the issue to be tried, as in the case of the denial of the execution of a note, or a deed, or a will, or any other instrument relied upon as the foundation of an action or defense.

It is insisted that all of the reported cases are of this character, and the language of Chief Judge RUGER, in *Peck v. Callagan* (95 N. Y. 75), is quoted, where it is said: "The disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purporting to have executed the instrument in controversy."

Whatever intrinsic merit there may be in this contention, we do not think it is available to the defendant upon this appeal. No such objection appears in the record. The genuine specimens were received in evidence, and the expert witnesses called and permitted to make the comparison and give their opinion upon the subject without any intimation from the defendant that such proof was inadmissible. The defendant himself even called two expert witnesses, and had the benefit of an opinion from them, after a comparison of the letters with the genuine specimens, to the effect that at least one of the letters was not written by the same person as the concededly genuine exhibits. When the letters were offered in evidence there was no objection to their reception on the ground that the proof of their genuineness was insufficient, but they were objected to solely on the ground that the letters themselves were incompetent and improper as evidence; an objection which pertains to the subject-matter of the proof offered and not to the method of its presentation, or to any of the preliminary steps to be observed in its introduction. If the defendant had seasonably objected to the evidence of comparison of handwriting, and the objection had been sustained, the prosecution might have been able to have furnished sufficient common-law proof of the genuineness of the letters to have

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authorized their admission as evidence, for one of the expert witnesses was a bank officer who had seen the defendant write, and who might have testified, from his personal knowledge of the defendant's handwriting, that, in his opinion, he wrote the letters in question, and other like testimony might have been produced.

The evidence objected to was not, in its essential nature, incompetent, and, therefore, all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed to have been waived. (*Turner v. City of Newburgh*, 109 N. Y. 301; *Bergmann v. Jones*, 94 id. 51.)

Upon the cross-examination of the expert witnesses for the prosecution, the defendant, for the purpose of testing the accuracy of their judgment, submitted to them nine different specimens of handwriting, and each was asked to compare them with the letters and the specimens put in evidence by the people, and to say whether in his opinion, they were in the same handwriting. Each gave a different answer, and with two exceptions, each testified that some of the specimens were written by the same person who wrote the letters and the other specimens; but no two witnesses agreed as to the particular specimens which were so written. The defendant then offered to prove that these nine specimens were not in the handwriting of the defendant, but were written by his brother, and the evidence was excluded. We can discover no error in this ruling. It was a collateral matter properly used for the purposes of a cross-examination, and the defendant was bound by the replies of the witness to the questions put.

It served as an impressive warning to the jury to closely scrutinize the expert evidence, because of the want of concurrence of judgment on the part of the witnesses when they were required to compare the letters with specimens, of whose authorship they were ignorant; and, to that extent, the cross-examination was valuable and proper, although it must rest somewhat in the sound discretion of the trial court to determine how far it shall be carried. But the defendant could not be

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permitted to go farther and to litigate the immaterial issue of the authenticity of the additional specimens submitted by him for such a purpose. (*Hilsley v. Palmer*, 32 Hun, 472.) It would give rise to a multiplicity of collateral issues which might render the litigation interminable; for the people would have the right to disprove if they could, the testimony offered, and, by a comparison of handwriting show that these specimens were not written by the defendant's brother.

The case of the *First National Bank of Hornellsville v. Hyland*, (53 Hun, 108, affirmed by this court 125 N. Y. 711), is not applicable here. The inquiry upon cross-examination was there limited to the genuineness of other signatures, which were already in evidence.

Nor does the case of the *Mutual Life Ins. Co. v. Suiter* (131 N. Y. 557) aid the defendant. It was there held that a party was not necessarily limited to the genuine signatures, introduced by his adversary for the purpose of comparison, but should be permitted to put in evidence other genuine signatures in order to afford as wide a range for comparison as might be practicable.

But the handwriting offered here was not that of the defendant, but of a stranger to the controversy, and the object of its proposed introduction was not for the purpose of comparison under the Act of 1880, but to affect the degree of credit to be given to the testimony of the expert witnesses.

The defendant had been in the employ of the owner of the burned barn as coachman and gardener, and was discharged some three months before the fire because of the ill feeling between him and the servant girl. He was familiar with the location and arrangement of the barn and other buildings upon the premises, and knew that a poisonous preparation, called London Purple, was kept on a cupboard in the barn and he had used it in spraying vines, and for the destruction of insects in the garden. The people were permitted to prove, under defendant's objection, that upon the night of the fire and before it occurred, a span of horses and a pony and cow, kept in the barn and belonging to the owner, were poisoned with

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London Purple and all died shortly afterwards; that his carriage in the same barn was hacked and the curtains and cushions cut into shreds; that his carriages and cutters in the adjoining carriage house were cut and damaged; but his brother's carriages and cutters in the same barn were not injured. The evidence was sufficient to support the inference that the malicious injury to the personal property was done upon the same night that the fire occurred and by the incendiary, and as a part of the same criminal scheme which resulted in the destruction of the barn. Under such circumstances the evidence was competent. (*Hope v. People*, 83 N. Y. 427.) It very clearly tended to prove that the fire was not accidental; that its origin was instigated by malice and not from the desire of gain; that it was kindled by some person having the intimate knowledge of the defendant in regard to the situation of the property, and it was properly received, even though it may have tended to establish the defendant's guilt of another crime than the one set forth in the indictment on trial.

There is no other exception in the record requiring attention, and the judgment of conviction should be affirmed.

All concur.

Judgment affirmed.

135	457
140	336
135	457
147	475
135	457
160	874

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
STEPHEN TOWER, Appellant.

One T. was convicted of the crime of forgery in the second degree under an indictment which contained a single count and charged that he "did make, forge and alter, and put off as true," the indorsement of one D on a promissory note. The evidence was conflicting as to whether the indorsement was written by defendant, but there was evidence which justified a finding that he wrote it or procured it to be written, being present at the time, aiding and abetting the forgery, and it was not controverted that he uttered or offered to pass the note. Defendant's counsel requested the court to direct a verdict in his favor on the ground that the evidence did not warrant a conviction of the crime of which he was charged, and he moved for an arrest of judgment on the same ground. Both motions were denied. *Held*, no error: that as no demurrer was taken, the objection that two distinct offenses were

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charged in one count of the indictment will be deemed to have been waived and did not constitute a ground for which the judgment could be arrested. (Code Crim. Pro. §§ 325, 467.)

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which affirmed a judgment of the Court of Sessions of the county of Niagara entered upon a verdict convicting defendant of the crime of forgery in the second degree.

The facts, so far as material, are stated in the opinion.

Richard Crowley for appellant.

P. F. King for respondent. It was proper to accuse the defendant of all the acts constituting forgery in the second degree in one count of the indictment. (Bishop's Directions and Forms, § 462; *Bork v. People*, 91 N. Y. 13; *People v. Every*, 20 N. Y. S. R. 461.) If there is any formal defects in the indictment they have been waived. (Code Crim. Pro. §§ 285, 684; *People v. Weldon*, 111 N. Y. 569; *People v. Williams*, 18 N. Y. S. R. 403.)

ANDREWS, J. The indictment contained but a single count, and charged that the defendant "did make, forge and alter, and put off as true," the indorsement of one Diez on a promissory note. The forging and the uttering of a forged promissory note, or of an indorsement thereon, are distinct and separate offenses, and each under one statute constitute the crime of forgery in the second degree, and subject the offender to the same punishment. (Code Civ. Pro. §§ 511, 521.)

On the trial the defendant's counsel, at the close of the case on the part of the prosecution, requested the court to direct a verdict for the defendant on the ground "that the indictment charged the defendant with having made and forged the signature of Diez, and that the evidence does not warrant a conviction of the crime of which he is charged in the indictment,"

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and after verdict he moved an arrest of judgment, stating the same ground. The motion to direct a verdict and the motion in arrest were denied, and the exceptions to the rulings thereon present the only questions of law urged on this appeal.

There was a conflict of evidence upon the point whether the indorsement of Diez, which was admitted to be a forgery, was written by the defendant. But the evidence justified a finding that he wrote the indorsement, or procured it to be written, being present at the time, aiding and abetting the forgery. In either case he was properly charged as principal. (Penal Code, § 29; *State v. Packer*, 93 Mo. 88; *Chidester v. State*, 25 Ohio St. 433.) It is not controverted that the defendant uttered or offered to pass the note with the forged indorsement. The principal point urged for a reversal is that the indictment is bad for duplicity in charging two distinct offenses in one count, viz., the forging and the uttering of the forged indorsement. It was held in *People v. Rynders* (12 Wend. 428) that a count for forging an instrument could be united with a count for uttering the same instrument, in the same indictment, and that the prisoner might be properly tried on both charges at the same time.

Sections 278 and 279 of the Code of Criminal Procedure prescribe that an indictment must charge but one crime and in one form, except that the crime may be charged in separate counts, to have been committed by different means, and that where the acts complained of may constitute different crimes, such crimes may be charged in separate counts. Under the Code it is perhaps doubtful whether the two offenses of forgery and uttering the forged instrument could be properly united in the same indictment. The crimes are distinct, arising upon different acts, although each constitutes the offense of forgery in the second degree. But assuming that the offenses could not be united in the same indictment, the remedy is pointed out in the Code, and that is by demurrer. (Code Crim. Pro. § 323.) Where not taken by demurrer the objection is waived and does not constitute one of the grounds for which judgment can be arrested. (Code Crim. Pro. § 467.) It was

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formerly held that a prisoner was entitled to avail himself on motion in arrest of every objection in substance or form which could have been taken on demurrer to the indictment. (NELSON, J., *People v. Wright*, 9 Wend. 197.) But the practice was not uniform, and it was held in some courts that the objection of duplicity was no ground for motion in arrest. (See *Polinsky v. People*, 73 N. Y. 72, and cases cited.)

In this case there was no objection taken on the trial to the form of the indictment. The verdict was general, and the sentence was appropriate to either offense. Under the circumstances, the point raised is not tenable.

The judgment and conviction should be affirmed.

All concur.

Judgment affirmed. _____

185 460
151 18

JERUSHA VAUGHN, Respondent, v. THE VILLAGE OF PORT CHESTER, Appellant.

Plaintiff had contracted to sell property upon which an assessment was imposed by defendant for a local improvement. The receiver of taxes published a notice and demanded payment, notifying plaintiff that the property would be sold unless the assessment was paid. Upon return to the warrant that the assessment was unpaid, defendant's board of trustees passed a resolution directing its treasurer to advertise and sell. Plaintiff then asked to be allowed to deposit with the vendee sufficient to cover the amount of such assessment, until a determination of the proceedings taken to test its legality. Said trustees refused this request or to make any arrangement to delay the sale. Plaintiff then paid the assessment at the same time serving notice that she paid under protest and reserved her right to sue for and recover the same. In an action brought to vacate said assessment and to recover the amount paid the illegality of the assessment was conceded. *Held*, that such payment was involuntary it having been made under circumstances amounting to coercion at law; and that plaintiff, having established the invalidity of the assessment, was entitled to recover back the money paid.

Reported below, 60 Hun, 401.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an

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order made July 2, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This was an action to vacate an assessment alleged to have been illegally made on plaintiff's property in the village of Port Chester for the grading of Haseco and Irving avenues, and to recover back the amount paid thereon.

The facts, so far as material, are stated in the opinion.

Maurice Dillon for appellant. There is no allegation in the complaint, nor was there any evidence whatever offered, or any finding by the trial court, or any claim made, that the plaintiff was ignorant of any facts, or was induced by a mistake of fact in making the payment of the assessment. (*Tripler v. Mayor, etc.*, 125 N. Y. 635.) Having shown that there was no warrant outstanding in the hands of any officer to enforce payment at the time payment was made, the trial court was not justified in "finding that the payment was made under coercion and duress." (Laws of 1868, chap. 818, § 31.) The agreement to convey was entered into after the reassessments were made. Plaintiff voluntarily undertook the payment of them rather than lose a good bargain. (*Chase v. Chase*, 95 N. Y. 374; If the assessments were imposed under an unconstitutional law, they were void on their face, and a sale would create no cloud. (*Wells v. City of Buffalo*, 80 N. Y. 253; Laws of 1868, chap. 818, § 38; *City of Detroit v. Martin*, 34 Mich. 170.) The payment was voluntary and with full knowledge of the facts. Such payment cannot be recalled. (*Vandebeck v. City of Rochester*, 122 N. Y. 289; *Phelps v. Mayor, etc.*, 112 id. 216; *Vaughn v. Vil. Port Chester*, 115 id. 637; 43 Hun, 427; *Trippler v. Mayor, etc.*, 125 id. 517; *Redmond v. Mayor, etc.*, Id. 632; *Dillon on Mun. Corp.* § 940.) Where payment is not made in ignorance of any facts as to the illegality of the assessments, and there is no compulsion by seizure of person or goods, there can be no recovery, and the payment is voluntary. (*Phelps v. Mayor, etc.*, 112 N. Y. 222; *Redmond v. Mayor, etc.*, 125 id. 632; *Tripler v.*

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Mayor, etc., Id. 617.) The General Term erred in the application of the law to the facts. (2 Dillon on Mun. Corp. § 942; *Lamborn v. Comrs., etc.*, 97 U. S. 181; *R. R. Co. v. Wyandotte*, 16 Kan. 587; *Dunham v. Griswold*, 100 N. Y. 225; *Quincy v. White*, 63 id. 376; 31 Penn. St. 73.)

Wilson Brown, Jr., for respondent. Plaintiff's payment was made under duress. (*Browns v. May*, 120 N. Y. 357; *People ex rel. v. Carter*, 119 id. 557.) Where the plaintiff has paid an assessment unwillingly and not voluntarily, but by reason of threats and duress on part of the defendant, which assessment was void *ab initio* by reason of the act of the legislature being unconstitutional, under which such assessment was made, it is clearly a case where the amount so paid for such void tax can be recovered in an action therefor. (*Phelps v. Mayor, etc.*, 112 N. Y. 222; *Horn v. Town of New Lots*, 83 id. 100, 103; *Pooley v. City of Buffalo*, 122 id. 592; *Bruecher v. Vil. of Portchester*, 101 id. 240; *Jex v. Mayor, etc.*, 103 id. 536; *Peyser v. Mayor, etc.*, 70 id. 497; *Newman v. Suprs.*, 45 id. 676; *Strusburgh v. Mayor, etc.*, 87 id. 452; 2 Dillon on Mun. Corp. § 943; *Bellinger v. Gray*, 51 N. Y. 610; Browne on Assessments, 221; *Remsen v. Wheeler*, 105 N. Y. 357; *Browns v. May*, 120 id. 357; *People ex rel. v. Carter*, 119 id. 557.)

GRAY, J. The plaintiff has succeeded below in vacating an assessment imposed upon her property by the defendant upon the ground of its illegality, and by the judgment she has been awarded the recovery back of the moneys she had formerly paid in discharge of the assessment. The assessment was laid in 1878 and was in the nature of a re-assessment, to cure defects invalidating an earlier assessment for the expense of grading an avenue in the village. The payment of this assessment was made in January, 1880, and under these circumstances. The plaintiff had contracted to sell to the board of education the property in question and to convey free of incumbrance. When the deed was to be delivered, this assessment stood against the property and the warrant for its collection was in

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the hands of the receiver of taxes, not yet returned. The receiver returned his warrants on January 5, 1880, and on the same day the board of village trustees passed a resolution for the advertisement and sale of all property upon which the assessments had not been collected. An effort to arrange for a suspension of the enforcement of the assessment failed; the vendee of the property being willing to agree to take the deed and that there might be a deposit of sufficient of the purchase-money, to abide the result of a test suit as to the validity of the assessment. Thereupon, and on January 24, 1890, the plaintiff paid the amount due under the assessment; protesting, at the same time, against being compelled to make the payment. Subsequently the illegality of the assessment was determined in an action commenced in March, 1880, to obtain such a determination; the final decision of this court being given in January, 1886. (*Tingue v. Port Chester*, 101 N. Y. 294.) Upon the trial of the present action the illegality of the assessment complained of was conceded, on the strength of our decision, and the litigation has turned upon the question of whether the payment was made under such coercion by law as would sustain a recovery back of the moneys. The defendant insists, and that presents the only ground upon which we need consider its appeal, that the payment was voluntary on the plaintiff's part. If that were true and it was made simply to enable her to close with the vendee for the sale of the property, then the appellant should prevail. If a payment of an illegal assessment is made to successfully close a business transaction, it is a payment for convenience and, therefore, voluntary. To make it involuntary, it must be made because of coercion in fact or coercion by law. The former would be exemplified in some duress of person or of goods, and the latter would exist if a warrant was out for the collection of the assessment, or where such proceedings had been taken under the charter of the municipality as should, or could, result in the enforcement and realization of the assessment. (*Bruecher v. Port Chester*, 101 N. Y. 240; *Redmond v. The Mayor*, 125 id. 632; *Tripler v. The Mayor*, Id. 617.)

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This plaintiff did not pay this assessment until there did exist such a legal compulsion as would justify her conclusion that payment alone could prevent the enforcement of the collection by the village authorities. Admitting that the receiver of the village lacked sufficient power to enforce his warrant, there, nevertheless, was the further step taken by the village trustees upon the receiver's return, by the resolution directing the treasurer to sell. When proceedings to collect the assessment had taken such legal shape as that the payment might be enforced by a sale authorized to be made, then the payment by the plaintiff could not be termed a voluntary one, within the doctrine laid down in the cases of *Peyser v. The Mayor* (70 N. Y. 497); *Horn v. New Lots* (83 id. 100); *Bruecher v. Port Chester* (*supra*), and *Tripler and Redmond v. The Mayor* (*supra*).

This plaintiff was not obliged to pay the assessment to successfully complete a sale of her property, for the vendee was willing to take title, under indemnity against the future obligation to pay the assessment. She paid the assessment when proceedings to collect it had reached that point that the collection was threatened to be enforced by a sale of her property. I do not think she was obliged to wait any longer to see what would actually be done after the board had thus authorized the advertisement and sale. She was justified, then, in paying to the village treasurer, in order to protect her property and to prevent incurring the further expense contemplated.

I think the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. ISAAC P. MARTIN, Appellant, v.
THEODORE W. MYERS et al., Respondents.

135	465
146	248
135	465
151	22

Under the New York Consolidation Act (§§ 879, 903, chap. 410, Laws of 1882) an assessment for a local improvement in said city can only be vacated or modified, through the affirmative action of the landowner, by resort to the special remedy therein provided; and this, although the assessment is void.

Accordingly *held*, that a certiorari did not lie to review the action of the board of revision and correction of assessment lists in confirming an assessment.

(Argued October 8, 1892; decided October 11, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 15, 1892, which confirmed the proceedings and determination of the board of revision and correction of assessment lists of the city of New York, confirming an assessment for paving Kingsbridge road in said city from One Hundred and Fifty-fifth street to One Hundred and Ninetieth street, which proceedings were brought up for review by writ of certiorari.

The facts, so far as material, are stated in the opinion.

George G. Munger for appellant. The board of revision had not jurisdiction to confirm an assessment of the entire expense of paving the Kingsbridge road against the property of the appellant. (Laws of 1882, chap. 410, §§ 285, 812-832, 868, 877, 915, 916, 917, 920; Laws of 1876, chap. 103; Laws of 1877, chap. 159; Laws of 1878, chap. 255; *McLoughlin v. Miller*, 124 N. Y. 510.) The assessment in this case is illegal and invalid for the reason that the provisions of the Consolidation Act in reference to the board of assessors and the board of revision and correction of assessment lists, and prescribing their duties and mode of procedure, are unconstitutional and void, because no notice to the taxpayer is therein provided for, and no opportunity given him for a hearing of his objection to the assessment. (*Stuart v. Palmer*, 74 N. Y. 183; *Spencer v. Merchant*, 100 id.

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585; *People v. Wemple*, 117 id. 77; *People v. Turner*, Id. 227; *McLaughlin v. Miller*, 124 id. 510; *In re Amsterdam*, 126 id. 158; *In re Union College*, 129 id. 308; *People v. Nichols*, 79 id. 582; *Sharp v. Speir*, 4 Hill, 76.) The assessment is irregular and illegal for the reason that no sufficient notice was given to the appellant to appear before either the board of assessors or board of revision, and no sufficient opportunity for a hearing of his objections before either board. (*In re Ford*, 6 Lans. 92.) The writ of certiorari is the proper remedy. (Code Civ. Pro. §§ 2120, 2122; *Le Roy v. Mayor, etc.*, 20 Johns. 430; *Starr v. Trustees, etc.*, 6 Wend. 564; *People v. City of Rochester*, 21 Barb. 656; *People v. City of Brooklyn*, 8 Hun, 56; *C. Bank v. City of Elmira*, 53 N. Y. 49; *Bertles v. Numan*, 92 id. 152; *In re N. Y. & H. R. R. Co.*, 46 id. 546; *Fitzgerald v. Quann*, 109 id. 441; *McManus v. Gavin*, 77 id. 36; *Taylor v. Mayor, etc.*, 82 id. 10; *Solon v. Williamsburgh*, 114 id. 122; *In re Boyd*, 35 N. Y. S. R. 37; *Strusburgh v. Mayor, etc.*, 87 N. Y. 452; *People v. Gilon*, 126 id. 147; *Eno v. Mayor, etc.*, 68 id. 214; *People v. Betts*, 55 id. 600.) If the necessary construction of this title 3 is that it abrogates and abolishes all common law remedies, such as suits or actions, writ of certiorari, etc., and leaves in their place only a petition to the court, in which very limited and comparatively small relief is granted, the whole scheme is unconstitutional and illegal, for the reason that it sweeps away all former remedies of the landowner for the protection of his rights, which were vested rights, and puts in their place no equal or sufficient substitute. (Cooley's Const. Lim. [6th ed.] 350, 356; *Call v. Haggerty*, 4 Mass. 430; *Bronson v. Kenzie*, 1 How. [U. S.] 311; *Johnson v. Band*, Hempst, 533; *West v. Sansom*, 44 Geo. 295; *Penrose v. E. C. Co.*, 56 Pa. 46.)

D. J. Dean for respondent. The writ of certiorari does not lie to review the action of the board. (Code Civ. Pro. § 2122; Laws of 1882, chap. 410, §§ 897, 914; *Smith v. Mayor, etc.*, 99 N. Y. 424; *Jex v. Mayor, etc.*, 103 id. 536; *Dis-*

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fenthaler v. Mayor, etc., 111 id. 331; *Tripler v. Mayor, etc.*, 125 id. 617; *In re Smith*, 99 id. 424; *People ex rel. v. Gilon*, 36 N. Y. S. R. 1004; *People ex rel. v. Gilon*, Id. 1005; *People ex rel. v. Gilon*, 37 id. 645; *Mayer v. Mayor, etc.*, 101 N. Y. 284; *Lennon v. Mayor, etc.*, 55 id. 361; *Astor v. Mayor, etc.*, 62 id. 580.) The board of revision and correction of assessments was under no obligation to give any notice to the petitioner when it was to meet. (Laws of 1882, chap. 410, § 871; *Spencer v. Merchant*, 100 N. Y. 585; 125 U. S. 345; *Stuart v. Palmer*, 74 N. Y. 183; *In re Common Council of Amsterdam*, 126 id. 158.) The contention of the relator that the board of assessors has jurisdiction to assess him for only such proportion of the expense of the improvement, not exceeding one-half, as should be deemed equitable by the commissioner of public works, pursuant to section 8 of chapter 565 of the Laws of 1865, is not well founded. (*In re N. Y. Inst.*, 121 N. Y. 234.) The relator's contention that the assessment ought to be imposed in yearly installments, assessments of five per cent of the entire amount, is not well founded. (*People ex rel. v. Gilon*, 37 N. Y. S. R. 645.)

FINCH, J. The purpose of the writ of certiorari issued in this proceeding is to review the action of the assessors and board of revision in levying an assessment for improving the roadway of what is described as the Kingsbridge road in the city of New York. The work was commenced in 1888, completed in 1889, and the assessment made and confirmed in 1890. The petitioner alleges jurisdictional defects which make the assessment absolutely and wholly void, and seeks an affirmative judgment annulling and vacating the entire proceeding. Refusing to avail himself of the special remedy given by the Consolidation Act, he claims the right to vacate the assessment by an affirmative application for that sole purpose. It is quite certain, and we have so held, that the owner of land subjected to the apparent lien of a void assessment may resist a levy upon his property for its payment, or, where the invalidity arises outside of the record and does not appear on its face,

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may pay the assessment and then recover it back from the city. (*Chase v. Chase*, 95 N. Y. 373; *Matter of Smith*, 99 id. 424; *Jew v. Mayor, etc.*, 103 id. 536, and 111 id. 339.) But beyond these remedies for a void assessment which no statute has taken away, and outside of this special remedy for fraud or substantial error given by the Consolidation Act (Chap. 410, Laws of 1882), it is now claimed that a void assessment may be vacated by an affirmative proceeding on the part of the landowner through the operation and effect of a writ of certiorari, and whether that is permissible or not becomes the primary question on this appeal.

In framing the special remedy for fraud or substantial error the legislature took occasion to limit and restrain the application of other and existing remedies. It provided that no suit or action in the nature of a bill in equity or otherwise should be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall be confined to their remedies in the proceedings under that title. We have described this provision as broad and unqualified, and applicable to all assessments. (*Eno v. Mayor, etc.*, 68 N. Y. 214; *Mayer v. Mayor, etc.*, 101 id. 284.) By its terms an assessment can only be vacated or modified through the affirmative action of the landowner by resort to the special remedy provided. To forbid the vacating of an assessment by a bill in equity, and yet permit it upon a certiorari, would deprive the intended restraint of all its force, and is prevented by the express limitation which confines the affirmative action of the landowner to the special remedy provided. Although most of the provisions of title 3 of the Consolidation Act relate to assessments made before June 9, 1880, we have ruled that the special remedy by petition to correct assessments made after that date remains and is regulated by section 903. Under its provisions the landowner can obtain no other relief than a reduction of his assessment to a just proportion of the fair value of the work done. (*Matter of Feust*, 121 N. Y. 299.) That case clearly intimates that no other affirmative remedy to vacate or set aside the assessment remains to the landowner,

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and that is true under the explicit language of the section even where the assessment is void. (*Matter of Smith, supra.*) And so the General Term in New York have been constrained to hold that a certiorari cannot properly issue to vacate an assessment. (*People ex rel. Consolidated Gas Co. v. Myers*, 47 N. Y. St. Rep. 70.) Where the error complained of consists in some matter of form amounting to an irregularity, or some injury resulting from fraud, the special remedy of a reduction will usually give adequate relief. But where it is sought to vacate the assessment entirely as void and a nullity the Consolidation Act interposes its prohibition, and the combined force of sections 897 and 903 leaves to the landowner aggrieved no affirmative right to vacate, and remits him wholly to his defense when his property is levied upon, or in some cases to his right to remove the apparent lien by paying the tax, and then suing to recover it back. If there is hardship in the law, as there seems to be, there was at least some justification in the flood of litigation which was sought to be arrested, and the loss and confusion which followed.

The order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.

185 400
187 542

CLARK R. GRIGGS, Appellant, v. MELVILLE C. DAY et al.,
Respondents.

A stipulation of the parties on trial before a referee, that the referee may charge such fees for his services as he deems proper, is invalid and may not be enforced, as it does not specifically fix a different rate of compensation from that prescribed by the Code of Civil Procedure (§ 8296), but leaves the amount thereof open and indefinite; and so does not change the statutory rate in the only manner authorized by the Code.

A stipulation fixing a different rate from that prescribed made verbally at the commencement of the trial, and afterwards reduced to writing, a sufficient compliance with the requirement that to change the rate there must be a consent of the parties "at or before the commencement of the trial."

(Argued October 8, 1892; decided October 11, 1892.)

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APPEAL from order of the General Term of the Superior Court of the city of New York, made May 2, 1892, which affirmed an order of the Special Term denying a motion to retax costs.

The facts, so far as material, are stated in the opinion.

Calvin Frost for appellant. The General Term erred in affirming the order of the Special Term approving the rejection by the clerk of the item in question upon the taxation of the plaintiff's costs. (*Chase v. James*, 16 Hun, 14; *F. N. Bank v. Tamajo*, 17 id. 240; 77 N. Y. 476; *Mark v. City of Buffalo*, 87 id. 184; Code Civ. Pro. § 3296.) The stipulation in the case at bar is sufficient in law. The item of \$7,500 paid to the referee by the plaintiff in reliance thereon should have been taxed by the clerk, and the court below erred in affirming the rejection of this item by the clerk. (*F. N. Bank v. Tamajo*, 17 Hun, 240; 77 N. Y. 476; *Keator v. U. & D. P. R. Co.*, 7 How. Pr. 42, 43; *Mark v. City of Buffalo*, 87 N. Y. 184.) The Supreme Court having previously decided that just such a stipulation, made under precisely similar circumstances, was valid, this one must be so held, whether this court shall consider such decision sound or unsound. (*Douglas v. County of Pike*, 101 U. S. 687; *O. L. I. & T. Co. v. Debolt*, 16 How. [U. S.] 432; *Gelpeke v. City of Dubuque*, 1 Wall. 206; *Olcott v. Bd. Suprs.*, 16 id. 690.) The question presented by this appeal is purely one of law, and not at all one of fact. In such case the court should itself allow the disputed item, and should not send the matter back to the clerk. (*Crosley v. Cobb*, 37 Hun, 271.)

William R. Bronk for respondent. The referee's fees were not taxable for the reason that the stipulation in regard thereto was not made "at or before the commencement of the trial." (Code Civ. Pro. § 3296; *Chase v. James*, 16 Hun, 14; *Greenwood v. Marvin*, 29 id. 99.) The referee's fees were not taxable for the reason that no different rate from that allowed by law was fixed by the stipulation. (Code Civ. Pro.

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§ 3296; *Chase v. James*, 16 Hun, 14; *F. N. Bank v. Tamajo*, 77 N. Y. 476; *Mark v. City of Buffalo*, 87 id. 184; *In re Gilman* 12 Civ. Pro. Rep. 179; *In re Shaw*, 18 Hun, 195.)

GRAY, J. When the issues in this action came on for trial before the referee, the parties consented to waive the statutory provisions as to his fees; which consent was subsequently reduced to writing, as follows: "That the referee shall not be limited to the statutory fee of six dollars per day for his services in this case, but may charge such fees therefor as he deems proper." The plaintiff paid to the referee, upon taking up his report, the sum of \$7,500, fixed by him as his charge; but, upon the taxation of costs, objection being made by the defendant to its allowance, the clerk disallowed the item. The court below has felt bound by authority to sustain the clerk's ruling, and we are constrained to affirm the order. It does not appear that the referee's fees were unwarrantable, upon any ground connected with the litigation. We are permitted to assume that they constituted a fair compensation for the services rendered, the objection to them being rested upon the sole grounds that the stipulation was not made "at or before the commencement of the trial," and that "the rate of compensation" was not fixed by the stipulation.

The first ground of objection we regard as frivolous. If parties agree, as they did agree here, in the commencement, to waive the statutory provisions, and, subsequently, during the trial the agreement is entered upon the referee's minutes, or otherwise reduced to writing, the waiver is sufficient in such respects.

The second ground of objection, however, is within a decision of this court, in the case of *First National Bank v. Tamajo* (77 N. Y. 476), and must be sustained. It is true that that decision was upon the provision in the former Code, and, also, that the precise point raised by that appeal was the sufficiency of an oral agreement to take the question of the referee's charges out of the statute. But the present Code provision (§ 3296) equally requires the "rate of compensation" to be

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“fixed by the consent of the parties ;” and, with respect to the construction to be attached to the whole section, the opinion in the *Tamajo* case was too comprehensive and deliberate to be now disregarded. It undoubtedly was the intention of the learned judge, in delivering the opinion of the court, to carefully lay down a rule to be followed in all cases, and, hence, he considered the subject in the light of the language made use of in the Code and of the general policy of the law. He held that an agreement in writing which did not fix any rate of compensation, but left it to the referee to make, was not fixing the prescribed rate of compensation in the mode specified by the Code, and he reasoned that such an agreement was contrary to the general rule that costs should “not depend as to amount upon the discretion of any court or officer.” In the present case, the defendants have sought to escape upon a purely technical objection from the effect of a written stipulation, which it was their duty to recognize, and which the promptings of a moral and an honorable sense should have impelled them to abide by. To hold them, however, to the stipulation, would compel us to run counter to the previous decision of the court, and as stability of decision is rather to be preferred, as a rule in the administration of justice, we should not, for an occasional instance of hardship in the application of the established rule, be moved to swerve from it.

The order should be affirmed.

All concur.

Order affirmed.

Statement of case.

PEOPLE ex rel. GEORGE C. CARTER, Appellant, v. FRANK
RICE, Secretary of State, Respondent.

In re Application of HARTLEY V. D. HORN, for a Mandamus,
Appellant, v. BOARD OF SUPERVISORS OF ONEIDA COUNTY,
Respondent.

PEOPLE ex rel. CHARLES F. POND, Appellant, v. BOARD OF
SUPERVISORS OF MONROE COUNTY, Respondent.

Before a court may determine that an act of the legislature is unconstitutional and void, a case must be presented in which there is no reasonable doubt; the incompatibility of the act with some provision of the Constitution must be manifest and unequivocal.

A constitutional provision may be impliedly abrogated by the adoption of a later one, which is clearly and unquestionably antagonistic to it, although the original provision in terms remains unaltered.

Under the provisions of the State Constitution (Art. 3, §§ 4, 5) providing for an enumeration of the inhabitants of the state in 1855, and at the end of "every ten years thereafter," and for an alteration of the senate districts and apportionment of members of assembly at "the first session after the return of every enumeration," the power to make the alteration and apportionment is not limited to regular sessions; but when, after the adjournment of the regular session at which an enumeration bill is passed, and after an enumeration thereunder, an extraordinary session is called by the governor, and he recommends this subject for consideration, such a session is the "first session" within the meaning of said provision, and the legislature so in session has power to make the changes and apportionment.

Where the first legislature, convened at the expiration of a ten years' period, fails to perform the duty imposed upon it of directing an enumeration, the power to direct it is not lost until the recurrence of another ten years' period, but the duty devolves upon the next and each succeeding legislature until the constitutional mandate is obeyed.

The amendments to the State Constitution, made in 1874, which struck out the provision denying to a colored person the right to vote, who had not the prescribed property qualification, and relieving all those not so qualified from direct taxation (Art. 2, § 1), and which omitted from the provision in reference to the apportionment of members of assembly, the clause excluding from the enumeration "persons of color not taxed" (Art. 3, § 5), had the effect to abrogate and strike out the similar words in the provision relating to the reorganization of senate districts. (Art. 3, § 4.)

There is no presumption that any particular proportion of colored persons not taxed resides in any one senate district, and unless the existence of

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an unequal proportion in the different districts is proved, it may not be held that any one has been injured by a failure to exclude such colored persons from the number of inhabitants upon which senate districts are based; and as, the courts will not attempt to remedy errors that injure no one, in the absence of proof of such an unequal proportion, a court is not called upon to determine the question as to the constitutionality in this regard of an act reorganizing senate districts which does not exclude from the calculation "persons of color not taxed." The constitutional provision (Art. 3, § 4) vesting in the legislature the power to alter the senate districts after each enumeration, and requiring this to be done so that "each senate district shall contain, as near as may be, an equal number of inhabitants," etc., grants to the legislature a discretion in carrying out the power, and the court has no jurisdiction to review the exercise of this discretion, unless it appears that it has been plainly and grossly abused (ANDREWS and FINCH, JJ., dissenting). Accordingly *held* (ANDREWS and FINCH, JJ., dissenting), that the Apportionment Act of 1892 (Chap. 397, Laws of 1892) was not violative of any constitutional provision, and so, was valid.

Reported below, 65 Hun, 236.

(Argued October 4, 1892; decided October 13, 1892.)

APPEAL in the first above-entitled proceeding from order of the General Term of the Supreme Court in the third judicial department, made September 22, 1892, which denied an application for a mandamus, requiring the secretary of state, to issue election notices under the Apportionment Law of 1879 (Chap. 208), and enjoining him from filing election returns under the Apportionment Act of 1892 (Chap. 397), or performing any act thereunder.

Appeal in the second above-entitled proceeding from order of the General Term of the Supreme Court in the fifth judicial department, made September 13, 1892, which affirmed an order of Special Term denying an application for a mandamus to compel the board of supervisors of the county of Monroe to forthwith convene and divide the county into three assembly districts, in accordance with said apportionment act.

Appeal in the third above-entitled proceeding from order of the General Term of the Supreme Court in the fourth judicial department, made September 13, 1892, which affirmed an order of Special Term, which denied an application for a mandamus

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to compel the board of supervisors of the county of Oneida to meet and proceed to divide Oneida county into assembly districts under said apportionment act.

The facts, so far as material, are stated in the opinion of PECKHAM, J.

E. H. Risely and *Henry M. Love* for appellants in *People ex rel. Carter v. Rice*. Any citizen has the right to apply for the relief asked. (*People v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 344; *People ex rel. v. Rice*, 129 id. 461.) The apportionment act was not passed at the "first session after the return" of the enumeration, and is invalid and unconstitutional. (Const. N. Y. art. 3, §§ 4, 5; *People v. Fancher*, 50 N. Y. 288; 1 Story on Const. §§ 406, 454; *People v. Wemple*, 125 N. Y. 485; *Lanning v. Carpenter*, 20 id. 447; *People v. Albertson*, 55 id. 50; *Newell v. People*, 7 id. 9.) The enumeration and the apportionment based upon it are unconstitutional and void, because "persons of color not taxed" are included. (Const. N. Y. art. 3, § 4; *Wynehamer v. People*, 13 N. Y. 378; 1 Story on Const. §§ 407, 409, 413, 448, 451, 453; *People ex rel. v. Potter*, 47 N. Y. 375, 380, 383; *People ex rel. v. Wemple*, 125 id. 485, 488; *Rumsey v. People*, 19 id. 41; *Brown v. Clark*, 77 id. 369; *Taylor v. Porter*, 4 Hill, 140, 144; *People v. Draper*, 15 N. Y. 532, 544; Cooley's Const. Lim. 168; *Rumsey v. People*, 19 N. Y. 41, 46; *Kinney v. City of Syracuse*, 30 Barb. 349, 360; 3 Keyes, 110; *People ex rel. v. Albertson*, 55 N. Y. 50, 55; *Presser v. Illinois*, 116 U. S. 252.) The act of apportionment does not comply with other provisions of the Constitution, and is, therefore, unconstitutional and void. (*Newell v. People*, 7 N. Y. 9, 118; 1 Story on the Const. §§ 505, 634, 678; *People v. Potter*, 47 N. Y. 375, 379, 382; *People v. Wemple*, 125 id. 485, 493; *People v. Fancher*, 50 id. 281, 288; *Kinney v. City of Syracuse*, 30 Barb. 349; *People v. Collins*, 19 Wend. 56; *Prouty v. Storm*, 11 Kans. 261.) The rule which has been invoked, that the court will not review questions of fact, is not applicable. (*People v. Draper*,

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15 N. Y. 546; *Rumsey v. People*, 19 id. 41; *W. W. M. Co. v. Shanahan*, 128 id. 345; *De Camp v. Ereland*, 19 Barb. 81; 1 Story on Const. [3d ed.] §§ 376, 392; *People v. Albertson*, 55 N. Y. 50.)

S. W. Rosendale, Attorney-General, for respondents in *People ex rel. Carter v. Rice*. The enumeration of the inhabitants of the state on which the apportionment was founded, was constitutional and legal, notwithstanding the fact that it was taken in the year 1892, and not in a year the number of which ended with the figure "5." (Const. N. Y. art. 3, § 4; *Smith v. Jones*, 1 B. & Ad. 328; *Ex parte Heath*, 3 Hill, 42; *People ex rel. v. Tompkins*, 64 N. Y. 57; *Metcalfe v. Mayor, etc.*, 17 N. Y. S. R. 97; *State v. Smith*, 67 Me. 328, 332; *State ex rel. v. Camden*, 39 N. J. L. 620; *In re Census Superintendent*, 15 R. I. 614; *R. W. & O. R. R. Co. v. Jones*, 106 N. Y. 330; *People ex rel. v. Board of Police*, 46 Hun, 296; 107 N. Y. 235; *People v. Fancker*, 50 N. Y. 288, 291; Story on Const. § 400; *McClusky v. Cromwell*, 11 N. Y. 601; *People ex rel. Potter*, 47 id. 375; *People ex rel. v. Angle*, 109 id. 564; *People ex rel. v. Wemple*, 125 id. 485, 493.) The apportionment law of 1892, is not rendered invalid, because passed at an extraordinary session of the legislature, held in 1892, subsequent to the return of the enumeration. (Const. N. Y. art. 3, § 4; *Rumsey v. People*, 19 N. Y. 41; *People v. Fancker*, 50 id. 288; *People v. Lippincott*, 64 Ill. 256.) The objection that the senate apportionment is unconstitutional because, in estimating the number of inhabitants in the senate districts, the legislature did not, and were not furnished with any information whereby it could exclude from representation "persons of color not taxed," is not well taken. (Laws of 1892, chap. 397; *Wynehamer v. People*, 13 N. Y. 342; *Presser v. Illinois*, 116 U. S. 252; *P. Co. v. City of Keokuk*, 95 id. 80; *Pennyman's Case*, 103 id. 714-717; *Unity v. Burrage*, 103 id. 459; *Trade-Mark Cases*, 100 id. 82; *Baldwin v. Franks*, 120 id. 679; *Murdock v. City of Memphis*, 20 Wall. 590; *Lyddy v. L. I. City*, 104 N. Y.

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218; *Slaughter-house Cases*, 16 Wall. 36; *People v. King*, 110 N. Y. 410; *Neal v. Delaware*, 103 U. S. 370; *Rumsey v. People*, 19 N. Y. 42; *People ex rel. v. Dayton*, 55 id. 367.) The alteration of the senate districts, and the "apportionment" of members of the assembly, among the several counties, by chapter 397, Laws of 1892, was legally made. (*I. & S. L. R. R. Co. v. Horst*, 3 Otto, 300; *Reed v. Smith*, 42 Col. 251; *Prouty v. Storm*, 11 Kansas, 261; *People ex rel. v. Durston*, 119 N. Y. 569; *W. W. M. Co. v. Shanahan*, 128 id. 345, 360; *Rumsey v. People*, 19 id. 42, 47, 48; *People v. Albertson*, 55 id. 50; *In re N. Y. E. R. R. Co.*, 70 id. 327; *Amy v. Watertown*, 130 U. S. 319; *People v. Draper*, 15 N. Y. 532.) The act of altering the senate districts, and apportioning members of the assembly by the legislature, is not within the power of the judiciary to review. (*Marbury v. Madison*, 1 Cranch, 67; *Kilbourn v. Thompson*, 103 U. S. 168; Cooley on Const. Lim. [6th ed.] 192; *People ex rel. McLean v. Flagg*, 46 N. Y. 401; *W. W. M. Co. v. Shanahan*, 128 id. 345-360; *People v. Albertson*, 55 id. 50; *In re N. Y. E. R. R. Co.*, 70 id. 327; *People ex rel. v. Durston*, 119 id. 569; *Amy v. Watertown*, 130 U. S. 319.) The court ought not to declare the act unconstitutional. (*Rumsey v. People*, 19 N. Y. 42; *Amy v. Watertown*, 130 U. S. 319; *Sharpless v. Mayor, etc.*, 21 Penn. St. 147.)

H. J. Cookingham for appellant in *People ex rel. Horn v. Supervisors*. Mandamus is the proper proceeding to compel a board of supervisors to perform a duty required by law. (*People v. Suprs.*, 8 N. Y. 317; *People v. Suprs.*, 34 id. 268; *People v. Schiellein*, 95 id. 134.) A peremptory mandamus may issue in the first instance where the applicant's right to the writ depends upon questions of law only, and notice has been served upon the defendant. (Code Civ. Pro. § 2070; *People v. R., W. & O. R. R. Co.*, 103 N. Y. 95.) To proceed to a hearing without traversing the averments in the relator's affidavit admits the truth of the averments and is equivalent to a demurrer. (*People v. St. Lawrence Co.*, 103 N. Y. 541.) A

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citizen of the county has sufficient interest in the performance of a duty imposed upon the board of supervisors to institute proceedings for mandamus. (*People v. Sullivan Co.*, 56 N. Y. 249; *People v. Halsey*, 37 id. 344; *People v. Rice*, 129 id. 449.) The act known as chapter 5 of the Laws of 1892, which provides for an enumeration of the inhabitants of the state, is constitutional. (Const. N. Y. art. 3, § 4; *Rumsey v. People*, 19 N. Y. 41; *People v. Cook*, 14 Barb. 259; *People v. Cook*, 8 N. Y. 67; *Ex parte Heath*, 3 Hill, 42; *Bank of Chenango v. Brown*, 26 N. Y. 467; *People ex rel. v. Board of Police*, 107 id. 235; *People ex rel. v. Thompkins*, 64 id. 53; *People v. Allen*, 6 Wend. 486.) The report of the enumeration of inhabitants made by the secretary of state to the legislature, furnished the proper evidence upon which to act in fixing the senate districts and apportioning members of assembly among the counties of the state. (*Lanning v. Carpenter*, 20 N. Y. 417; *DeCamp v. Overseer, etc.*, 19 Barb. 81.) It was not necessary to make a separate enumeration of colored citizens not taxed, for the reason that this requirement of the State Constitution is in conflict with the Constitution of the United States. (*Neal v. Delmore*, 103 U. S. 370; *Strauder v. West Virginia*, 100 id. 303; *People v. King*, 110 N. Y. 416; *Wynehamer v. People*, 13 id. 378-440; *P. Co. v. City of Keokuk*, 95 U. S. 80; *Unity v. Burrage*, 103 id. 447, 459.) The act, chapter 397, Laws of 1892, organizing the senate districts and for appointment of members of assembly among the counties of the state is constitutional. (*People ex rel. v. Potter*, 47 N. Y. 375; 49 Mo., 215; *People v. Fancher*, 50 N. Y. 288.) The court cannot say that the apportionment bill is unconstitutional, for the reason that the division of the state into senatorial districts was unfairly made. (*Rumsey v. People*, 19 N. Y. 41-49; *People v. Lawrence*, 36 Barb. 177; *United States v. Williams*, 5 McLean, 133; *People ex rel. v. Durston*, 119 N. Y. 569; *Prouty v. Stover*, 11 Kan. 261.) All intendments must be taken in favor of the validity of statutes, and "before a court will deem it their duty to declare an act unconstitutional, a case must be presented in which there is no rational doubt."

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(*Ex parte McCollum*, 1 Cow. 550; *Rich v. Flanders*, 39 N. H. 304; *H. B. Co. v. U. F. Co.*, 29 Conn. 210; *People ex rel. v. Briggs*, 50 N. Y. 553; *Kerrigan v. Force*, 68 id. 381; *Speer v. School Directors*, 50 Penn. St. 150; *Mayor, etc., v. State*, 15 Mary, 376; *People v. Draper*, 15 N. Y. 532; *Amy v. Watertown*, 130 U. S. 319.)

J. I. Sayles, *W. E. Scripture* and *D. F. Searle* for respondents in *People ex rel. Horn v. Supervisors, etc.* It is conceded that if it were the duty of the board of supervisors of Oneida county to obey chapter 397 of the Laws of 1892, the appellant had the right to institute and maintain this proceeding, and upon his relation the court had power to compel the performance of that duty by mandamus. (*People ex rel. v. Halsey*, 37 N. Y. 644; *People ex rel. v. Bd. Suprs.*, 56 id. 249; *People ex rel. v. Common Council*, 77 id. 503; *People ex rel. v. Rice*, 129 id. 401; *People ex rel. v. Rice*, Id. 449.) The legislature has not the inherent power to take an enumeration or make an apportionment. (Const. N. Y. art. 3, § 1; *Kilburn v. Thomson*, 103 U. S. 168; *People ex rel. v. Keeler*, 99 N. Y. 477.) The legislature is a creature of the Constitution. (*People ex rel. v. Allen*, 42 N. Y. 404; *People v. Bd. Education*, 13 Barb. 400; *Taylor v. Porter*, 4 Hill, 140; *DeCamp v. Carpenter*, 20 N. Y. 447; *People v. Gilson*, 109 id. 389.) The act of the legislature requiring the board of supervisors to meet on the third Tuesday of July, 1892, and divide the county of Oneida into two assembly districts, known as chapter 397 of the Laws of 1892, is unconstitutional and void. The alteration of the senate and assembly districts therein made was not based upon an enumeration of the inhabitants taken in conformity with section 3, article IV of the Constitution, which requires such enumeration: "In the year 1855, and at the end of every ten years thereafter." (*People ex rel. v. Dayton*, 55 N. Y. 367; *Lanning v. Carpenter*, 20 id. 453; *DeCamp v. Ereland*, 19 Barb. 87; *Kinne v. City of Syracuse*, 3 Keyes, 111.) The division of the state into senate districts was not made by excluding "aliens and persons of

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color not taxed," as required by the Constitution. (Const. N. Y. art. 3, § 4.) The apportionment was in violation of the constitutional provision that such apportionment shall be "at the first session after the return of every enumeration." (N. Y. Const. art. 10, § 6; Laws of 1826, chap. 283.) The words "at the first session after the return of every enumeration," as used in the Constitution, do not permit an apportionment to be made at an extraordinary session. (Const. N. Y. art. 4, § 4; *Purdy v. People*, 4 Hill, 384; *People v. Hyde*, 89 N. Y. 12; *Page v. Allen*, 58 Penn. St. 338; *Slate v. Barnes*, 24 Fla. 29; *McKoan v. Devries*, 5 Barb. 196.) The senate districts as constituted in such act are not so altered that "each senate district shall contain as near as may be an equal number of inhabitants." And the members of assembly are not proportioned among the several counties of the state as nearly as may be according to their respective inhabitants, as required by sections 4 and 5, article III. (*State v. Cunningham*, 51 N. W. Rep. 724.) The legislature had no constitutional warrant to convene in extraordinary session and no power or jurisdiction to enact any law at the so-called extraordinary session. (Const. art. 4, § 4; *People v. Fancher*, 50 N. Y. 259.)

C. D. Kiehl for appellants in *People ex rel. Pond v. Supervisors*. The writ of mandamus is the proper remedy in this case sued out at the relation of a citizen and elector of the city of Rochester. (*People ex rel. v. Supervisors*, 56 N. Y. 249; *People ex rel. v. Halsey*, 37 id. 344; *People ex rel. v. Rice*, 129 id. 449; *People ex rel. v. Rice*, Id. 461.) The court has the power to compel the board of supervisors to perform the duties required of them in section 3 of the apportionment act, chapter 397 of the Laws of 1892. (*People v. Supervisors*, 8 N. Y. 330; *People v. Supervisors*, 34 id. 268; *People v. Schiellein*, 95 id. 134.) The enumeration taken pursuant to chapter 9 of the Laws of 1892 was constitutional. (*McPherson v. Leonard*, 29 Md. 327; *Hill v. Boyland*, 40 Miss. 618; *Miller v. State*, 3 Ohio, 375; *People v. Supervisors*, 8 N. Y. 328.) The apportionment act was not passed at the same ses-

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sion during which said enumeration was returned, but at the first session after the return thereof. (*People v. Fancher*, 50 N. Y. 288; *State v. Cunningham*, 5 N. W. Rep. 740; Cooley on Const. Lim. 54.) The apportionment act is not unconstitutional upon the ground that it is based upon an enumeration prepared and reported by the secretary of state to the legislature, in which "persons of color not taxed" are included. (*United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, Id. 542; *People v. Snyder*, 41 N. Y. 403.) The apparent inequalities in the apportionment of members of assembly and senators, is a question of fact within the discretion of the legislature and cannot be reviewed by this court. (*Arnold v. Reese*, 18 N. Y. 57, 67; *Rumsey v. People*, 19 id. 48; *Supervisors v. People*, 7 Hill, 505, 511; *People v. Draper*, 15 N. Y. 533, 545; *Prouty v. Stover*, 11 Kan. 261.)

S. W. Rosendale, Attorney-General, for appellant in *People ex rel. Pond v. Supervisors*. The schedule on which the argument against the validity of the senate districts is predicated will not be considered by the court on the questions here presented. (*In re N. Y. E. R. R. Co.*, 70 N. Y. 327; *People ex rel. v. Durston*, 119 id. 569; *Amy v. Watertown*, 130 U. S. 319.) The objection made to the apportionment of assembly districts because of the point as to "persons of color not taxed," not being excluded from the computation, is not appealable. (Const. N. Y. art. 3, § 5.)

W. A. Sutherland for respondent in *People ex rel. Pond v. Supervisors*. Monroe county was defrauded in the apportionment of 1892 and has the right to insist that the old apportionment shall stand until a new one shall do her justice. (*Bd. of Suprs. v. Baker*, 52 N. W. Rep. 954.) The court will not by mandamus compel the supervisors to comply with a direction of the legislature which leads to any violation of the Constitution. (*People ex rel. v. State Canvassers*, 129 N. Y. 360.) Under the census of 1892, Monroe county is absolutely entitled to four assemblymen. (*McCulloch v.*

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Maryland, 4 Wheat. 327; *People ex rel. v. Canaday*, 73 N. C. 198; *Darby v. Wilmington*, 76 id. 133.) The apportionment is void because it was had at the same session which provided for, and which received the returns from the enumeration, and hence, before the "first session after the returns of" the enumeration. (Const. art. 3, §§ 4, 5; *People v. Fancker*, 50 N. Y. 290; *Lanning v. Carpenter*, 20 id. 447; *Rumsey v. People*, 19 id. 41; *Smith v. People*, 47 id. 341; *Kinney v. City of Syracuse*, 30 Barb. 367; 3 Keyes, 110; Cooley on Const. Lim. 64; *Page v. Allen*, 58 Penn. St. 338; *Murphy v. Barnes*, 24 Fla. 29; *People v. Albertson*, 55 N. Y. 50.) The apportionment of 1892 was void because not based upon a constitutional census or enumeration. (142 Mass. 604; *Lanning v. Carpenter*, 20 N. Y. 447; Cooley on Const. Lim. 90; *Kilburn v. Thompson*, 103 U. S. 168; *Murphy v. Barnes*, 24 Fla. 29; *Brown v. Goblen*, 122 Ind. 113.) The Constitution expressly prohibits any reapportionment except one based upon a census taken in a year ending with the figure 5. (Const. N. Y. art. 3, § 5; *Kinney v. City of Syracuse*, 3 Keyes, 110; *People v. Morrell*, 21 Wend. 563; *Newell v. People*, 7 N. Y. 9; *People v. Albertson*, 55 id. 50.) The senate apportionment is unconstitutional because in estimating the number of inhabitants in the new senate districts, the legislature did not and were not furnished with any information whereby they could exclude from the basis of representation "persons of color not taxed." (Const. N. Y. art. 2, § 1.) If the apportionment of 1892 can be sustained, it follows that a new census can be taken in any year of grace, without regard to the ten year space which the Constitution says must stand between each census. It follows that the same legislature which provides for the enumeration may also attend to the apportionment, instead of the one meeting in January of the following year. (*McCulloch v. Maryland*, 4 Wheat. 327.)

PECKHAM, J. All these proceedings have for their object the decision of the question as to the validity of the Apportion-

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ment Act of 1892. The boards of supervisors of the counties of Monroe and Oneida are the only boards in the state which have refused to make a division of their counties into assembly districts for the purpose of carrying out the provisions of the act of 1892.

The secretary of state has issued and delivered to the clerk of Oneida county an election notice in which provision is made for the election of but two members of assembly therein, and the supervisors claim the right of the electors of the county to elect three members under the Apportionment Act of 1879, and therefore it is specially asked that the secretary be compelled to issue notices for the election of three members of assembly in the county of Oneida, pursuant to the apportionment contained in the law of 1879, and that the secretary be commanded to desist from doing any act or thing under chapter 379, of the Laws of 1892, or to in any way recognize that act as valid or binding.

This apportionment of 1892, it is alleged, violates the provisions of the Constitution in several particulars which are set forth, and the court is called upon at the instance of all parties to these litigations, to decide the questions involved at the earliest practicable moment in order that the supervisors and the election officers may be guided in the discharge of their duties by the opinion of this court as to the validity of the act of 1892.

We have given all the consideration possible to these cases since the argument thereof, and while the questions are in themselves most important and far reaching, yet we are compelled by the necessities of the case to decide them at once. We, however, feel more competent to do this because however important the questions may be we think the proper and correct answers are quite plain and clear.

The rule which has governed courts ever since the adoption of our constitutions, both federal and state, in relation to the exercise of the power to declare an enactment of the legislative body unconstitutional, has been laid down in many reported cases and has been rigidly adhered to by both the

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federal and state courts. Before courts will deem it their duty to declare an act of the legislature void as in violation of some provision of the Constitution, a case must be presented in which there can be no rational doubt. The incompatibility of the legislative enactment with the Constitution must be manifest and unequivocal. Judge DENIO, in *People v. Draper* (15 N. Y. 546), expressed the rule in substantially the above language. There is no doubt of its correctness and I have heard no counsel who have challenged it. We must proceed to the examination of the constitutionality of the act of 1892, guided by this rule.

Section 4 of article 3 of our State Constitution reads as follows: "An enumeration of the inhabitants of the state shall be taken under the direction of the legislature in the year one thousand eight hundred and fifty-five, and at the end of every ten years thereafter; and the said districts shall be so altered by the legislature at the first session after the return of every enumeration, that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed; and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators."

Section five of the same article, after providing for 128 members of assembly, continues: "The members of assembly shall be apportioned among the several counties of the state by the legislature, as nearly as may be, according to the number of their respective inhabitants, excluding aliens, and shall be chosen by single districts. * * * The legislature at its first session after the return of every enumeration, shall apportion the members of assembly among the several counties of the state, in manner aforesaid," etc. The apportionment and districts must remain unaltered until another enumeration shall be made as provided in the Constitution.

First. It is contended on the part of those who allege the invalidity of the law of 1892, that it was passed in violation of

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that provision of the Constitution which directs the alteration to be made by the legislature at the "first session after the return of every enumeration."

The act was in truth passed at an extraordinary session of the legislature called by the Governor, and after the return of the enumeration of 1892. The point is made that an extraordinary session is not such a session of the legislature as is contemplated by the Constitution. To my mind the objection is wholly without force. An extraordinary session is, nevertheless, a session of the legislature. The Governor, by the terms of the Constitution, has "power to convene the legislature (or the senate only) on extraordinary occasions." When thus convened, is not the legislature in session? And can it be for a moment correctly contended that a session thus convened is the same session which had already terminated by an adjournment without day? It is not a regular session, it is true; it is what the Constitution describes it, an extraordinary session, but yet a session of the legislature. The Constitution does not say that the session which is to deal with the question must be a regular one. All it directs is that the legislature at the first session after the return shall proceed to make the alterations. The Constitution provides for the assembling of the legislature on the first Tuesday in January in each year. When it adjourns *sine die*, has not the session of the legislature ended? The term of office of its members may not have ended, but the legislative session has certainly terminated by an adjournment without day. It could not again assemble and perform any valid act unless the Governor, under the special power given him by the Constitution, should convene it. When thus convened the legislature is in session, and it is clearly not the same session which was ended by a prior adjournment thereof without day. The Constitution does not provide that the next *legislature* after the return of the enumeration at its first session shall make this apportionment. It is directed to be made by the legislature at the first session after such return. Wherein does this extraordinary session fail to fill that description? It was a session of the

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legislature and it was the first which was held after the return of the enumeration, and it was competent to deal with that subject because of the recommendation of the Governor.

There is no basis, in the language of the Constitution, for the claim that the session of the legislature referred to in that instrument is the first session of the legislature which itself first convenes after the return of the apportionment. The Constitution does not say so, and I fail in finding any reason in principle or in the nature of the subject which calls for such a construction. On the contrary, to so construe it is to arbitrarily supply words which are not used and which neither the context nor the surrounding circumstances call for. Such construction also twists and distorts the ordinary and plain meaning of the language actually employed. The result is that in order to construe the Constitution in the manner desired, words must be supplied which have not been employed and the language actually used must be construed as meaning something different from the meaning ordinarily given to it.

This court is not prepared to make such an attempt.

We also fail entirely to see the force of any argument based upon the assertion that the Constitution intended that some considerable interval should elapse between the return of an enumeration and the apportionment of senators and members of assembly under it. There is nothing whatever in the language of the Constitution which assumes or seems to provide that any material interval ought to pass after the return of the enumeration and before the enactment of the statute. On the contrary, the language of that instrument with regard to this provision would seem clearly to point to definite and prompt action at the earliest practicable moment; in other words, action at the first session of the body that can make the alteration. Such language is not that which would be used for the purpose of advising or directing delay.

Judicial notice may be taken of the fact that an enumeration of the inhabitants of the state was ordinarily a matter that occupied some time to complete it, and the members of the constitutional convention of 1846, as well as the people,

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knew that it might, and in all probability it frequently would, happen that the legislature which ordered the enumeration would complete its other business and adjourn without day before the enumeration provided for was itself completed. In such event the legislature not being in session, could not apportion the districts and members. In order, however, to insure prompt action upon the matter and at the earliest opportunity, the Constitution provides for the alteration consequent upon an enumeration at the first session after its return. I think that under this constitutional provision the legislature which ordered the enumeration might remain in session until after its return and then itself proceed to the alteration made necessary by the results of such enumeration.

It would seem to be a complete perversion of the ordinary and plain meaning of language to change what on its face is clearly a direction for prompt action, into one providing for or securing delay. There is nothing in the nature of the subject which calls for it. On the contrary, as these alterations are to last but ten years before an enumeration is again presented for another alteration, every intendment would point to the prompt and speedy fulfillment of the constitutional duty, so that the legislature should at once represent the people of to-day and not those of years ago.

An argument in favor of that construction of the Constitution which would cause a delay in making alterations after an enumeration has been returned, is suggested in the fact that an examination of the different returns might reveal some great mistake or a gross fraud, and to such an extent that no alteration of a previous apportionment ought to be based upon such an enumeration. It is, of course, true that mistakes are possible, and it is conceivable that a fraud might possibly be perpetrated in some portion of the state. The idea, however, that the Constitution looks to any delay in legislative action following the enumeration, because of such possibilities, finds no lodgment in the language used in the instrument itself. Such possibilities attach to all human affairs and would be the accompaniment of the second as well as of a first enumera-

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tion. But the possibilities of any error or fraud which would really work any material injustice are so remote, both as to perpetration and discovery, that an argument for delay based upon them can have no weight whatever when brought before and compared with the plain language of our fundamental law. The argument for an interval of time is also answered by the fact that the legislature might provide for taking an enumeration in November or December, and the filing of the returns in the last of the month of December. The incoming legislature, which might meet in a day or two thereafter, is concededly competent to deal with the subject. And yet in such case there would be no material interval of time provided for or existing.

Another argument against regarding the extraordinary session of the legislature as competent to deal with this subject, consists in the assertion that if such a session can be claimed to fill the conditions of the Constitution, it would in that event rest with the Governor whether an apportionment act should be then passed, for he might call an extraordinary session and not recommend the consideration of this subject, and if he did not, the legislature, it is said, could not pass an apportionment act, although the extraordinary session were the first session after the return of the enumeration. If the Governor should call such a session and not recommend this subject for consideration, it might then be a question which of the two constitutional provisions should prevail, that which provided for the passage of the apportionment act at the first session, or the one which provided that at an extraordinary session the legislature should consider no other subject than such as should be recommended to it by the Governor. If the former provision should be held to prevail, the act could be passed, and if the latter, it could not. In such case the extraordinary session would not be the first session of the legislature within the meaning of the Constitution. Admitting that unless the Governor recommended the consideration of the subject to the legislature at the extraordinary session called by him, an apportionment act could not then be

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passed, it by no means follows that the legislature could not pass the act at such extraordinary session, provided the subject were recommended to its consideration by the Governor. In the one case the extraordinary session is not the first session after the return of the enumeration within the meaning of the Constitution, and in the other case it is. This is only saying that when a legislature which has ordered an enumeration adjourns without day before the return thereof, the first session of the legislature after the return of the enumeration will not occur until the regular legislative session provided for by the Constitution, unless the Governor should call an extraordinary session, but that if the Governor after a return of the enumeration should choose to exercise his constitutional power and convene the legislature in extraordinary session and recommend the subject of the apportionment to it, such extraordinary session would have the constitutional power to deal with the subject. There is nothing either dangerous or in the slightest degree calculated to awaken the fears of the friends of good government in holding that such a session of the legislature is, under the circumstances stated, fully competent to deal with the subject. And the holding is itself plainly called for by the language of the instrument under consideration.

Again the fact that the public printer has for many years included in one volume the laws passed at the regular and at extraordinary sessions of the same legislature, and indorsed the volume as containing the laws passed at the ninety-first or other regular session, taking no note of the extraordinary session, is not of the least consequence. For convenience of indorsement or for reference to a volume, the regular and extraordinary session may be regarded as the same, but their inherent difference as separate sessions of the legislature cannot be obliterated, and the fact that they constitute two sessions cannot be expunged by any action of the printer or of a state officer. No court in this state has decided the proposition that an extraordinary session of the legislature, which was the first session thereof after the return of an enumeration,

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could not pass an apportionment act. The language of Judge DENTON, in *Lanning v. Carpenter* (20 N. Y. 453), as to the lack of power of the legislature to alter the assembly, senate or judicial districts until the session of the legislature commencing in 1856, was evidently based upon the assumption that the return of the enumeration was not to be made until the commencement of that session. In such case the legislative session of that year would be the first session after the return of the enumeration. The case does not hold, or pretend to hold, that the legislature of 1855 could not have provided for an earlier return of the enumeration, which might then have been acted upon by the regular session of the legislature, if then in existence, or at an extraordinary session thereof called by the Governor and actually in session before January 1, 1856. That question was not before the court and received no consideration at the hands of the learned judge.

We think there is no force in the several objections made as to the extraordinary session not being the first session of the legislature.

Second. The act is alleged to violate the Constitution because based upon an enumeration taken in 1892, instead of 1885. It is true that it was the duty of the legislature in 1885 to direct an enumeration of the inhabitants of the state in that year, and if it had discharged that duty it would have been the duty of the legislature at the first session after the return of that enumeration to proceed to apportion the members of assembly and to alter the senate districts. The legislature of 1885 omitted to perform the duty of directing an enumeration which was cast upon it by the Constitution. Each succeeding legislature up to 1892 also omitted to perform this duty, and thus for several years the constitutional mandate had been violated. It is wholly immaterial to discuss the reason for such omission. It is clear that it should not prevent the performance of the duty by the next succeeding legislature. The provision of the Constitution is so far mandatory that we can say the legis-

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lature of 1885 ought to have complied with it by directing the enumeration, yet as it did not, the duty continued and the power of the next legislature to deal with the subject cannot be disputed upon any well founded principle. And this duty continued and was cast upon each succeeding legislature until the constitutional obligation was fulfilled. The same may be said of the obligation to make the apportionment. If it be not made at the first session after the return of the enumeration, the duty to make it devolves upon the legislature at the next and each following session, until the duty is performed. It cannot be tolerated that a legislature, by a mere omission to perform its constitutional duty at a particular session, could thereby prevent for another ten years the apportionment provided for by the Constitution. The apportionment made in 1879, which the Oneida board of supervisors asks us to still enforce, was itself not made by the legislature at the first session after the return of the enumeration of 1875. In the case of *Rumsey v. People* (19 N. Y. 41), the learned judge, delivering the opinion of the court, says the apportionment is valid, although not passed at the first session after the enumeration. It would seem as if authorities should not be required upon such a proposition.

Here is a plain duty imposed upon a legislature and it wholly fails to perform it. The Constitution does not in terms limit the performance of this duty to the particular legislature. It is a duty which in its very nature and essence is continuous. If the first legislature fail to perform it, can it be that, upon a subject of this kind, such failure shall be sufficient to thereafter prevent the performance of the constitutional mandate for the whole decennial term? There is, as it seems to us, neither sense nor principle upon which to base so extraordinary a proposition.

Because the duty has been omitted for one year, we think it rests with accumulated force upon the next and each subsequent legislature until it has been performed. It is of a nature which requires performance, and it is to the interests of the whole people that it should be performed as directed, and if

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not at that time, then at the earliest possible moment thereafter. We are of opinion that the objection made has no color of validity.

Third. A third objection is raised to the validity of this act. It is stated that, as to the senate districts, it is not based upon an equal number of inhabitants, excluding "persons of color not taxed."

One answer to this objection is offered by stating that these proceedings have reference to the invalidity of assembly districts only, and that in the provision of the Constitution for their formation it is not required to exclude from the enumeration persons of color not taxed.

We are inclined to the view that the act of apportionment is so closely connected as a whole that if the senate districts are based upon an absolutely unconstitutional enumeration, and to such an extent that it can be judicially seen that great injustice to many of the inhabitants of the state is the necessary and unavoidable result of such an enumeration, we cannot separate the assembly from the senate district, and the whole act must go down.

The objection itself is one which in its nature appears to be most ungracious. It urges a ground of invalidity which, if allowed, strikes out from the senate constituency all colored citizens who are not taxed. These men, it is claimed, must not be counted as inhabitants of the state for the purpose of creating senate districts. Since the adoption of the amendments to our Constitution in 1874, this view of the law, which is now urged with so much eagerness, has not been regarded as the true one.

The law which provided for the enumeration in 1875, did not contain any direction to separate persons of color into two classes, those who were and those who were not taxed, and to exclude the latter as a basis of apportionment, nor did the Apportionment Act of 1879 itself provide for the exclusion of persons of color not taxed, in making up the senate districts. This, of course, is not in any way conclusive of the question, although perhaps of some importance as a legislative interpreta-

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tion made by two different legislatures and almost immediately after the adoption of the amendments of 1874.

We think, however, there is an answer to the objection, which we will now proceed to give. From the earliest period of our state history up to 1874, a discrimination of some kind was made against the negro in regard to his right to vote.

By the Constitution of 1777, which created a property qualification as a condition of voting; the negro then being in a state of slavery was unable to comply with its provisions, and hence was unable to vote. In 1821, although a property qualification, or its assumed equivalent, was imposed upon all citizens as a condition of voting, yet it was made more onerous in the case of colored citizens, and such citizens were exempted from taxation, unless seized and possessed of a certain prescribed amount of real estate.

In the Constitution of 1846, no property qualification, as a condition of voting, was imposed upon the white citizen, but it was therein provided that "no man of color, unless he shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seized and possessed of a freehold estate of the value of \$250 over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at such election. And no person of color shall be subject to direct taxation, unless he shall be seized and possessed of real estate as aforesaid." (Constitution of 1846, § 1 of article 2.)

Here was, among other things, a property condition annexed to the exercise of the right to vote on the part of a colored person.

The meaning of the exclusion in sections 4 and 5 of article 3 of the Constitution of 1846, is at once plain when the above fact is considered.

In order to vote, a colored person had to be taxed as provided for in the Constitution, and unless he was the owner of a certain amount of real estate, he was exempt from all direct taxation. Here then was a class of colored persons which, by

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the terms of the Constitution itself, was exempt from the taxation therein spoken of. And when the Constitution, in the subsequent article (3), speaks of "persons of color not taxed," it clearly and without doubt refers to the colored persons not taxed as provided for in the preceding article limiting their right to vote, and providing for their exemption from direct taxation, unless owners of real estate as prescribed in the same article.

The framers of the Constitution evidently thought that persons of color, who were not entitled to vote, ought not to be counted in making up the number of inhabitants upon which to base the alteration of senate districts and the apportionment of members of assembly.

The Constitution remained for many years in this condition both as to the formation of senate and assembly districts and as to the right of the colored persons to vote. While it so remained, the war of the rebellion commenced and came to an end. Before 1874 the 13th, 14th and 15th amendments to the Federal Constitution were ratified and their adoption duly proclaimed.

Those amendments showed the great change which had come over the public mind in this country relative to the rights of the colored person. Slavery had been banished from the land by virtue of one of these amendments, and the right of the colored person to vote was treated of by the last of such amendments and the right was not to be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. I allude to these amendments only for the purpose of showing the trend and strength of the sentiment of the people of the north and also of this state upon the subject embraced in those amendments. History shows that this state was one of the ratifying parties to all of them, and their adoption by this and the other states shows that in the public estimation the time had passed when a man's color should be permitted to disqualify him from the exercise of any political rights or privileges.

All these amendments to the Federal Constitution had been

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ratified and adopted before the proceedings ending in the adoption of certain amendments to our own Constitution were inaugurated. The amendments to our State Constitution passed two legislatures consisting of different senates, and were submitted to the people and adopted by them in the fall of 1874. The first section of article two was amended by omitting the condition for the exercise of the elective franchise by the colored person, so that his right to vote was from that time placed upon the same foundation as that of the white inhabitant. The condition that he must be the owner of real estate to the amount of \$250, and actually taxed thereon, disappeared and with it also disappeared all legal distinction between colored persons into those taxed and those not taxed.

An amendment to the fifth section of article three was at the same time submitted to the people and adopted, and the clause providing for the exclusion of persons of color not taxed was omitted from the section as adopted. In some way not affecting this question the amendment to section four of the same article striking out the exclusion as to senate districts regarding persons of color not taxed, was not submitted to the people, and hence in words that section remains as it was. Does the section therefore still demand the exclusion of persons of color not taxed? I think not. It will be remembered that the plain meaning of the phrase in the two sections regarding the enumeration, as the Constitution stood at the time of its adoption as a whole, was that the legislature was to exclude from the inhabitants persons of color not taxed, as provided for in article 2, section 1 of the same Constitution. That section did provide both in regard to their taxation before being permitted to vote and also as to their exemption from direct taxation, and hence when a subsequent section alludes to persons of color not taxed, it naturally, if not necessarily, follows that it means by the use of such an expression the persons of color not taxed as already provided for in the same instrument. And when by amendment the provision which is thus referred to is stricken out, does not such exclu-

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sion impliedly abrogate the provision which was based upon the part thus dropped out? I think it does in a case like this where the reason for the continued existence of the provision in the 4th section of article 3, has been wholly taken away by the amendment already made to the 1st section of article 2.

A repeal by implication is not favored even in regard to a statute, still less can it be favored in regard to any provision of our organic law. It is, however, a question of intention in both cases. The power that made can unmake.

A constitutional provision can be impliedly abrogated by the adoption of another and later one which is antagonistic to it, although the original provision may in terms remain unaltered. The later will of the people constitutionally made known must in such case take the place of the other provision, even though it may still in form remain in the organic law as a part thereof. It can only be said that in the case of the constitutional amendment, the fact of its opposition to a former provision and the intent to displace it by the amendment adopted must be so plainly shown by the provisions themselves that there can be no rational doubt in regard to it. I think these conditions are entirely filled by the proof showing the adoption of the amendments to section 1 of article 2, and to section 5 of article 3. I have no manner of doubt that the people intended by the adoption of these amendments to effectually blot out all distinctions of a political nature between white and colored persons, and I think these amendments taken in connection with the sections as they stood before amendment clearly show that such intention has been effectually accomplished so far as the Constitution is concerned.

We are fully conversant with the indisputable proposition that courts cannot dispense with a constitutional or statutory provision, merely because it appears that the policy upon which it was established or created has ceased or changed. (*Brown v. Clark*, 77 N. Y. 369.) When, however, that change in constitutional policy is proved by wholly uncontested and overwhelming evidence and, indeed, is nowhere challenged or denied, and where effect to such change has been

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given in terms by amendments to more than one section of the Constitution, and where it appears that the provision in still another section, although not stricken out by an amendment in terms, is by the other amendments left without reason or excuse for its existence, it is not too much to hold that in such a case the alterations and amendments which have been actually made in the course of the attempt to effect the change of policy, do in effect and by implication strike out and abrogate a provision which, by reason of the amendments, has no longer any excuse for existence.

Another answer has been suggested to the general objection under discussion. It is that there can be no presumption that any particular proportion of colored persons not taxed lives in any one district and it cannot be presumed without proof that any one has therefore been injured by a failure to exclude such colored persons from the number of inhabitants upon which to base the senate districts. If the same proportion of colored persons not taxed to whites existed in all the districts, it is clear no one would suffer any harm from this failure to exclude such colored persons, and if no one would be harmed, it of course follows that no court would spend time in attempting to remedy errors which injured no one and which brought up nothing but abstract questions for adjudication.

No court should be called upon to presume any particular fact without the least legal evidence of its existence, for the purpose of thereby furnishing a reason for overthrowing an enactment of the legislature which must be presumed to have been enacted from good motives and for proper purposes.

Unless an unequal proportion of colored persons not taxed, to white persons, should be found or presumed to exist in the different districts, it cannot be said that any human being suffers harm. There is no evidence of the fact in these papers and its existence ought not to be presumed.

I think on both grounds herein set forth the answer to the claim of invalidity may well be placed.

So far in the discussion we have not alluded to any legal effect which the adoption of the amendments to the Federal

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Constitution may have had upon the provisions of our State Constitution on the same subject. We do not decide the case upon any such ground and we intimate at present no opinion upon that subject.

For the reasons above given we are of the opinion that the objection to the validity of the act of 1892, based upon the failure to exclude persons of color not taxed, cannot prevail.

I have given these objections such an extended discussion not because I have felt the least doubt as to their proper decision, but because they have been so eagerly and zealously urged by counsel at the bar and because of the opinions of some of the learned judges in the courts below, which gave a force and validity to one or two of them, which it is impossible for us to allow, and, therefore, we feel called upon to give our reasons for our dissent at greater length than we should otherwise deem necessary.

There is another objection to this act which we will now consider.

Fourth. It is finally objected that the act is invalid because the senate districts do not contain an equal number of inhabitants as nearly as may be. These proceedings relate only to the assembly districts in Oneida and Monroe counties, but the inequalities in the senate districts in other portions of the state are cited for the purpose of showing a violation of the constitutional mandate in their formation and as a consequence the invalidity of the whole act, including the apportionment of members of assembly. This question of inequality contains in my judgment the only debatable proposition arising in these cases.

The act of 1892 when compared with the returns of the population as contained in the last enumeration, must be conceded (when a like comparison is made of the former acts with the enumerations which preceded them), to be the one which most nearly approaches fairness and equality, yet it is the only one which has been brought before the courts.

From the formation of government under written constitutions in this country the question of the basis of representa-

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tion in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of numbers in representation has been the leading idea at all times in regard to republican institutions. Political divisions of the state have in New England been the bodies which were entitled to representation, and the town as a town and irrespective of the number of inhabitants has had its representative in the legislature, so that a large town necessarily had no more representation than a much smaller one. This is the case to-day in some of the New England states.

The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the legislature, resides of course in the first instance with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial. In intrusting such power to any particular body, the people could by their Constitution give written instructions as to how it should be carried out, yet the essential nature of the power still remains. If a portion of it be intrusted to a body of men acting as a board for the mere purpose of making a mathematical calculation and with instructions to discharge its duties in a way which is solely mathematical, it is clear that the board has no discretion whatever and it is bound strictly by the terms of the grant of power. In such case the people have not in reality parted with the whole power. There may then be a power in the court to correct the very slightest deviation from what can be clearly seen to be a mere ministerial duty. There being no possibility for the exercise of the slightest discretion, a violation of the arithmetical rule of proportion would become a violation of the Constitution and as such might be the subject of review by the courts. The power to review would exist because of the fact that the people had so bound and limited the exercise of the power to readjust the political divisions of the state that the power itself thus limited had become in its exercise by the body to

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which it was intrusted, one of a ministerial nature only. Its nature as a political power in the board itself would in such case have been changed by the refusal of the people to permit of its exercise upon any other than a mathematical basis. Hence a direction to a body created by the people for such a purpose, which permitted no discretion in its exercise under any circumstances, might properly form the subject of enforcement by the courts. This, however, is not the case under our constitution. The power to alter these political divisions has been deposited by the people with the legislature and under such circumstances as to compel the exercise of legislative discretion in carrying out the power granted. The political nature of the power is thus retained. The learned judge who delivered the opinion at Special Term in the *Pond* case himself admits that some discretion is vested in the legislature and that in the nature of things it must be so left. He was of opinion that the discretion thus vested in the legislature had been overstepped and that the constitution had been thereby violated, and that the courts could review and reverse this action of the legislature. Discretion is necessarily reposed in the legislature because of the direction of the constitution that in making up the senate districts they must at all times consist of contiguous territory and that no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators. It is also provided that in apportioning members of assembly every county shall be entitled to one member.

This renders the mathematical process impossible, both as regards senate districts and the apportionment of members of assembly. We start then with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might in its exercise possibly have come nearer to an equality, after complying with the special conditions mentioned in the Constitution? This would be to assert a power in the court to supervise the use of the discretion granted to the legislature, if such discretion were

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exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the Constitution, unless it is plainly and grossly abused. The expression "as nearly as may be," when used in the Constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall in good faith be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the legislature. We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been entirely lost sight of and an intentional disregard of its commands both in the letter and in the spirit had been indulged in.

In the report made to the senate of the United States in April, 1832, by a committee of that body of which Mr. Webster was chairman, it was stated that the words of the Federal Constitution were equivalent upon this subject to a direction to apportion the representatives among the states upon the basis of population, as nearly as may be. (3 Webster's Miscellaneous Works, 369.) It was then stated that the process theretofore adopted by congress was unconstitutional and that the true process was a mathematical one, which the report set forth. It was not then adopted by congress, which adhered to its old method. There is no intimation in the report that the action of congress, although what was termed unconstitutional, was subject to the revision of the courts. No such remedy was ever suggested. Congress has

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since that time adopted the theory of the report and made a mathematical problem of the subject and referred it to the secretary of the interior to carry out its instructions on the basis of arithmetic.

In this case mathematics cannot enter into the whole problem, because of the constitutional obligation as to county lines and county representation, and hence the sole question now is whether the legislative discretion has been so far abused as to render the act liable to an overthrow by the courts. This brings us to an examination of the act itself.

It can be stated at the outset that although the fairest that has been passed upon the subject the act is not an ideal one. There are some inequalities which any one individual intrusted with the power might at once remedy, but which might be very hard to alter when brought under the review of 128 assemblymen and thirty-two senators. Local pride, commercial jealousies and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected, all these things and many others might have weight among the representatives upon the question of apportionment, so that in order to accomplish any result at all, compromise and conciliation would have to be exercised. Looking at the act as a result of such circumstances, and it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts.

In regard to the senate districts some criticism has been indulged in, both in the courts below and by counsel here, for the purpose of showing they are inequitably made up. So far as regards the Oneida and Monroe districts there does not seem to be much room for adverse criticism. Those who claim the act to be void cite other senate districts, which, when compared together, are alleged to be unequal, and hence they claim the constitutional obligation in regard to senate districts has been disobeyed, and, therefore, the whole act is void.

It is proper to here remark that there are no figures in the record in these proceedings from which it can be determined

what are the numbers of inhabitants in the different senate districts in the city of New York. Certain figures have been referred to by counsel, but they have been obtained, not from the record in these proceedings or from any public record, but from some source whose accuracy cannot be relied on, and which at all events is not in any manner before the court.

The real burden of complaint lies in the alleged violation of the Constitution in regard to the apportionment of assembly districts. So far as these parties litigant are concerned, it would seem that courts would not be specially astute to discover some inequality in senate districts which did not affect the propriety or equality of the representation in the senate districts of which they are inhabitants.

As to the senate districts, when it is considered that in their make up county lines must be adhered to, unless a county is equitably entitled to two senators, it is plain that great and necessary discretion is left to the legislature in their formation. The union of different counties in the state for the purpose of making up a senatorial district which must consist of contiguous territory, and in regard to which counties cannot be divided, necessarily results in inequalities which can in no possible way be avoided.

Certain districts may be picked out from the whole number and compared with certain others, and inequality be charged against them. But when all the counties in the state are to be arranged and brought into connection upon some plan in which the express commands of the Constitution as to contiguous territory and county lines are to be observed, it will pass the wit of man to make such an alteration of the senate districts for this state that may not be the subject of adverse criticism and of alleged possible improvement. We are of the opinion that the legislature, by the alteration of the senate districts under the act of 1892, has not violated the legitimate and necessary discretion intrusted to it by the Constitution.

As to the assembly districts the burden of complaint rests upon the apportionment of four or five members of assembly out of 128.

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The learned counsel for the appellant in the case of the relator Carter makes up a list of the members of assembly as they have been apportioned and as he claims they should have been apportioned. In this list he shows that Albany is entitled to three, while four members are actually awarded. Dutchess is entitled to one, while two have been awarded. Kings is entitled to nineteen, while but eighteen have been awarded. New York is entitled to thirty-one, while but thirty have been awarded. Monroe is entitled to four, while but three are awarded. Queens and Rensselaer are entitled to but two each, while three each have been awarded them. This list shows that at least two counties (New York and Kings) have by the action of the legislature lost each one member while it is notorious that both were in accord with the dominant party in the legislature. It cannot be said that in regard to the others partisan considerations entered into the subject, because the counties to which the members were awarded are, when divided into districts, very uncertain as to the political complexion of their representatives in the assembly. By this act each county has been in fact awarded every member to which it was entitled by the ratio which obtained between population and representation. The only claim asserted or in fact existing is that in apportioning the remaining members after each county had been awarded its full number of members to which it was entitled upon the ratio adopted, the members thus remaining were in some few instances awarded to counties which had a less surplus over their ratio than some other counties, no county having enough to entitle it to another member upon the ratio existing.

In regard to these fractional parts of a ratio, an examination of the debates in the constitutional convention of 1846 shows that the subject of the representation of such fractions was discussed and efforts were made to provide in terms for a rule of representation for them, so as to limit the discretion of the legislature. (Debates on Constitution of 1846, page 366.) See also debates of constitutional convention of 1867 and the commission of 1872, where the subject was debated.

The convention of 1846 finally framed the provision without any statement as to the fractions of ratios or how they should be treated, and the question was thus left to legislative discretion to be exercised in good faith, and not to be abused.

The reason for the particular action of the legislature upon this question must be sought for in some considerations other than partisan, for I think it is shown these did not enter into the question upon this point.

The inference is fair that these changes were absolutely necessary in order to secure the passage of the bill, having regard to the conditions under which legislative action is practicable. The Constitution is silent as to the ratios and some of the assailants of the act insist upon making up a new ratio, which shall require a larger number of inhabitants than the 1-128 part in order to entitle any county to a member, and they obtain this ratio by deducting the population of thirty counties, which must have one member each, from the total population of the state, and then dividing it by ninety-nine, the number of members remaining to be apportioned, which gives them a new ratio of 48,800, which is 3,559 in excess of the ratio based upon an absolute equality of apportionment. This operates unjustly against the counties entitled to the largest number of members, so that in the case of New York, entitled to at least 31 members, there is a loss of 31 times 3,559, or 110,329. And so correspondingly in the case of Kings. There is no arithmetical necessity in the adoption of this new ratio, if there be a sufficient number of members of assembly to be apportioned to give one to every 1-128 part of the entire population, with four to spare. By adopting the larger ratio, which the opponents of the act insist on, eleven members of assembly remain to be assigned to counties not having a full multiple of the ratio necessary to entitle them to an additional member. As to eight of these it is conceded that they are actually assigned to counties having the highest fractional excesses, but not so large as the other counties named if the assignment was made according to the plurality of excess. But it must be observed that by the adoption of this

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new, arbitrary and unnecessary ratio, New York's representation would be reduced from 31 to 29, and Kings from 19 to 18, and that loss of three would fall to a portion of the state which, according to its population, has a much larger proportion of the business and wealth of the state.

Here were two ratios presented for adoption, each one of which had its defects, and the legislature certainly cannot be charged with any desire to be unfair or unjust if, in the distribution of the members of assembly after each county had received its full quota, according to the highest ratio, it took into account the large losses incurred by the populous counties if such ratio were adopted without modification.

It is also to be noted that the three members were assigned to counties, all of which have shown by the census increased population.

Other considerations might be added to show that the legislature of 1892, in the passage of the act under review, did not approach the danger line of an abuse of legislative discretion, but this opinion, which has grown to such large proportions, as well as the total lack of time, both warn me to desist from an attempt which is really unnecessary. It is proper at this stage to advert to the consequences which would or probably might follow the overturning of the act.

It is said, indeed, that courts have no right to look at the consequences which may follow their decision of legal questions. This is quite an erroneous statement of the principle. After a decision has been come to, it is true that courts have nothing to do with consequences. But in seeking for a correct solution of any legal question, especially the question of the proper construction of a statute or a constitution, the result which may follow from one construction or another is always a potent factor, and is sometimes in and of itself conclusive. In speaking upon the same subject in *Rumsey v. People* (19 N. Y. 52), the learned judge, in delivering the opinion of the court, said, upon a question of construction: "We have a right to consider the evil which would result from the prevalence of the alternative; * * * should the

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act be annulled and the new county (Schuyler) annihilated, the consequences would be disastrous." The learned judge then proceeds to state what they would be, and argues from them that another construction ought, if possible, to be given the act.

We are asked to say that in this act of 1892 the legislature has abused or overstepped the discretion devolved upon it by the Constitution. What is the result which would follow?

In the first place we should have every enumeration and every apportionment act brought before the courts for review, and as it would not be necessary to act immediately, any citizen at any time during the running of the decennial period would have the right to invoke the aid of the court to set aside as void any such act, and leave the people to suddenly confront such a situation as is now presented. This in itself is sufficient to induce a court to say that only in a case of plain and gross violation of the spirit and letter of the Constitution should such a power be exercised. Every county in the state but the two before us has acquiesced in the requirements of the act, apportioned its members among the towns and wards of the county or city, and done everything necessary to proceed to an election under its provisions. The greatest confusion and disorder would result from a holding that this act is invalid. Whether any members of assembly could actually be elected under any other law at this late day is quite problematical. The spectacle of a legislature elected under an unconstitutional law, or part of the members elected under it and part under another, is one which ought not to be contemplated without the greatest anxiety by all honest citizens.

When we come to the question of what law is in force in this state if the law of 1892 is not, the situation becomes most alarming. In the case of the relator Carter we are asked to command the secretary of state to issue notices for the election of members under the act of 1879. This act, if enforced now, would work still greater injustice than has ever been suggested against the act of 1892.

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The same reasoning which would set aside as void the act of 1892 would be still more powerful and cogent as showing the total invalidity of the act of 1879. That act, when passed, was well known to be a most unjust and unequal one, particularly in regard to the interests of New York and Kings counties. Governor Robinson, in his memorandum filed with the act, which he refused to approve, shows beyond question its disregard of the constitutional mandate as to equality. The governor therein called particular attention to the matter, and said: "In the distribution of members of assembly the bill is still further from meeting the requirements of the Constitution. I find that Cattaraugus county, with 45,737 inhabitants, has two members, while Suffolk, with 50,330, is given but one. Orange, with 82,225 inhabitants, has but two members, while St. Lawrence, with only 78,014, gets three. Nor can I understand the philosophy which gives to the latter county, with 78,000 inhabitants, the same representation as Monroe, which exceeds it in population by nearly fifty thousand. These discrepancies are not to be explained. They admit of no apology or excuse. They are of the same class as that so-called necessity which entirely deprives 150,000 inhabitants in New York and Kings of their proper representation." So wrote Governor Robinson while refusing to veto the act, because as it stood it was better than the condition of things which it was to replace. Should this court now after thirteen years, and when the injustice and inequality have vastly increased, still order the secretary of state to issue election notices under such a law and should a legislature be elected under it? It is said in answer that we need not decide upon the invalidity of the act of 1879, but leave it to the secretary of state what course to pursue and what law to regard, so long as he does not regard the act of 1892. This is as it seems to us a most absurd proposition and at the same time one fraught with the most alarming contingencies. To hold the act of 1892 void for this reason and yet to say nothing in regard to the law of 1879, which is far more obnoxious to the very arguments upon which we are asked to avoid the act of

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1892, is to place the people of the whole state in a most improper and unfair position. The necessity of deciding is also founded upon the petition of the relator in the case against Rice, that he shall be ordered to give notices under the act of 1879. The question will arise at once, what act are we living under and what apportionment is the true one upon which to base election of members of assembly? The people are entitled to know what law they are living under, and where the apportionment is to be found which is legal and under which they could proceed to elect members if there were time enough left in which to put the machinery at work to accomplish that end. But there is not, in fact, time enough left for such purpose.

If the act of 1892 is void, the act of 1879 is also plainly void and no election of members of assembly should be tolerated under it. This might relegate the people to the act of 1866, and thus we might have an attempt at an election for members of assembly under an act more than a quarter of a century old and a legislative representation of the people of that time. This would be a travesty on the law and upon all ideas of equality, propriety and justice.

We are compelled to the conclusion that this act of 1892 successfully withstands all assaults upon it and is a valid and effective law.

Upon the argument our attention was called to certain cases decided in Michigan and Wisconsin, involving to some extent the questions decided herein.

In some of them the violation of the spirit of the Constitution was gross beyond cavil or argument. They would come within the description of an abuse of legislative discretion. In others the positive commands of the Constitution as to counties were plainly violated. The actual decisions might perhaps be upheld on the lines laid down in this opinion, but there are some things stated in some of the opinions which go beyond what this court is prepared to concur in.

The discretion necessarily vested in the legislature must be finally disposed of by it, unless, as we have said, there is such

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an abuse of that discretion as to clearly show an open and intended violation of the letter and spirit of the Constitution.

The order in the first above entitled proceeding should be affirmed, with costs in all courts, and those in the second and third above entitled proceedings should be reversed and the motions for a mandamus granted, with costs in all courts.

GRAY, J. I concur in holding the apportionment act to be valid. The gravest objection which has been urged against its validity is that it has violated the constitutional requirement as to equality of representation in the legislature. I consider that the other points, which have been presented, have been sufficiently answered. They do not seem to me to suggest reasonable grounds for assailing this legislative act. But if any provision of the fundamental law of the state, intended to secure the equal representation of its citizens in the legislative department, has been violated by the act in question, it is then, properly, the duty of the judicial department of power to declare it unconstitutional and, therefore, void. The judiciary has a duty to pronounce all legislative acts null, which are contrary to the manifest tenor of the Constitution of the state.

Is that the case here? If it is, it arises out of the apportionment of members of assembly. I fail to see that in the arrangement of senate districts there exists any substantial ground for complaint. As to members of assembly, the constitutional requirement is that the legislature shall apportion them among the counties "as nearly as may be according to the number of their respective inhabitants." I think this language imports that some amount of discretion may be exercised by the legislature in perfecting an apportionment. For such an opinion I find support, both in the juxtaposition of the words and in the manner of their introduction into our Constitution. If no discretionary power resided in the legislature to vary from a mathematical and methodical adjustment of members of assembly, according to the population of counties, the presence of the words "as nearly as may be"

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is meaningless. Their absence would better consist with the sense contended for. But they were brought in by an amendment of our first Constitution, which was adopted in 1801. Previously, the Constitution required that "the legislature do adjust and apportion" the representatives in assembly to the number of electors in the counties. By the amendment in 1801, that provision was amended so as to require them to apportion "as nearly as may be according to the number of electors, etc." In this change, or substitution, of language, I deem an intention evidenced to confide something to the judgment of the legislature, and, in view of many obvious considerations, very wisely and justly so.

It was apparent that greater or less inequalities must arise in an apportionment and that, after each county had received its full number of assemblymen, according to the ratio of apportionment established, there would remain some members to be distributed among those counties having excesses of population over the ratio. The contention of counsel is that that distribution must be in the order of the highest excesses, or remainders over, and any discretion in the matter is denied. In the present case, for instance, there were eleven members of assembly to be so distributed among counties having fractional excesses, and the showing is that three were apportioned out of the strict order in which those excesses stood. It may be remarked, in passing, that in an apportionment of one hundred and twenty-eight members among the counties, this showing evidences no glaring departure from strict equality, nor any scheme to defraud the people in the matter of representation. It is the general rule of law that the courts have no concern with the motives of the legislative body in passing an act. If they find the power conferred to so enact, they may not intervene to prevent the execution; and at all times they should be slow to interfere with the legislative department of power. If there were here a flagrant disregard and an unmistakable violation of the constitutional injunction that the apportionment should be "as nearly as may be" according to the number of citizens, the courts

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might feel justified in declaring the act void for unconstitutionality. But we have no reason to impute any fraudulent motives, and the showing of three instances of departure from a methodical apportionment is not enough to evidence any deliberate violation of the constitutional requirement. The legal presumption is in favor of the constitutionality of every act of the legislature, and that presumption is not overcome in this instance, where the legislative act simply evidences the exercise of discretion in performing a political duty. We may concede that adherence to a simply mathematical system of distribution of members among the counties, in the order of their excesses of population over the ratio, is the better rule; but deviations may be demanded by public exigencies. Some consideration must be had of the difficulties which environ the passage of an act of apportionment, in the conflicting claims and demands of representatives; some latitude of action must be permitted in considerations which pertain to the geographical situation and necessities of counties, and some allowance must be made for active opposition engendered by political feeling. As the bill was reported, an exact and mathematical apportionment appeared, but to secure the passage of the act some changes were made by the legislature. I do not think that the legislature is to act as a mechanical contrivance for the mathematical distribution of members of assembly. The Constitution does not say so in unmistakable terms, and, if it does not, courts should hesitate to assert it. Something is confided to the wisdom and judgment of the legislative body in performing this constitutional duty, and if in the execution of the duty the result is not perfect, the courts should presume that the legislature endeavored to accomplish it as nearly as might be. I think, according to a logical and candid view of the constitutional requirement, it might be impracticable, unless there was some discretion vested in the legislature with respect to carrying it into effect. There has been no abuse of this discretion, and for us to adjudge the act unconstitutional and to declare it void, would be, in my judgment, a most unwise construction, and would be to arro-

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gate a power of interference, as dangerous in the precedent as it seems unwarranted in the law.

ANDREWS, J. (dissenting). I am of opinion that the Apportionment Act of 1892 is void for the reason that in apportioning members of assembly among the counties of the state, it violates the rule of equality prescribed by the Constitution. It is the cardinal principle of free representative government that every elector shall have equal weight in exercising the suffrage. Proportionate representation according to population is the rule both in the Federal and State Constitutions, except where, by reason of constitutional arrangements and compromises, its full application has been departed from. The rule can never be disregarded consistently with our representative system, except under the express sanction of the people, given in the Constitution, or necessarily implied from its provisions. This is a constitutional principle so fundamental and so well recognized that the citation of authorities in its support is unnecessary.

The Constitution of New York, in prescribing the manner of constituting the legislature, has adhered to the principle of representation according to citizen population, except so far as it was necessarily modified to accomplish another purpose also deemed of great importance, viz., that the autonomy of the counties should be preserved in the formation of senate districts, and that each county should be entitled to at least one member of assembly. The Constitution (Art. 3, § 4) prescribes that counties shall not be divided in the formation of senate districts, except where a county shall be equitably entitled to more than one senator, and (Art. 3, § 5) that each county, except the county of Hamilton, shall be entitled to one member of assembly, and that when a county is entitled to more than one member, it shall be divided into districts; but that no town shall be divided in the formation of assembly districts. This scheme of creating territorial districts for the election of senators and members of assembly necessarily results in some inequality. But except as modified by these

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provisions, the Constitution carefully preserves the principle of representation according to population. It enjoins upon the legislature to so constitute the senate districts "that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed" (Art. 3, § 4), and it commands that "the members of assembly shall be apportioned among the several counties of the state" by the legislature, as nearly as may be, according to the number of the respective inhabitants, excluding aliens." (Art. 3, § 5.)

The intention of the people to preserve and guard, by the Constitution, the principle that every voter is to have equal weight and voice in the selection of representatives, subject only to the modification before referred to, is unmistakably indicated in other parts of the legislative article. The provisions prescribing decennial enumerations of the inhabitants of the state, and a decennial arrangement of senatorial and assembly districts, were inserted to accomplish this object. The supreme purpose of these provisions was to secure at short recurring periods a readjustment of the inequalities, which might arise from the growth or shifting of population during the decennial period. Further, to prevent such inequality and to secure the practical operation of the fundamental principle of equal suffrage, the Constitution in the provision quoted, enjoined upon the legislature that the senate districts should be organized, and the members of assembly should be apportioned, as "nearly as may be," according to the number of inhabitants.

By what process the legislature reached the results embodied in the apportionment act does not distinctly appear. It had before it the enumeration of the representative population in each of the counties of the state. The problem (in respect to the assembly) was to apportion among the several counties the 128 members of assembly, "as near as may be," according to the number of the respective inhabitants, excluding aliens. It seems to have first assigned to twenty-nine counties (reckoning Fulton and Hamilton as one), each having less than a

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full ratio of population necessary to constitute an assembly district, one member each, leaving ninety-nine of the 128 members unassigned. It then assigned to each of the other counties a member or members, corresponding with the number to which it was shown to be entitled, as ascertained by dividing the whole population of the county by the ratio. This left remainders in all the counties and eleven of the 128 members unassigned. The eleven counties having the largest remainders were: Orange, 44,474; Onondaga, 44,460; Kings, 39,400; Ulster, 39,593; Monroe, 34,833; Steuben, 32,600; St. Lawrence, 31,800; Westchester, 31,226; Queens, 26,376; Dutchess, 26,272; Chautauqua, 25,085.

If in apportioning the eleven unassigned members the apportionment had been made upon the principle of assigning them to the counties having the highest remainders, one would have been assigned to each of the counties above named in their order. The legislature did assign an additional member to each of the first four counties named, and when it came to Monroe, skipped and gave no additional member to that county, but did instead award one to Steuben. It refused to give an additional one to St. Lawrence, but gave one to the succeeding county, Westchester. It gave one to Queens and one to Dutchess, but gave none to Chautauqua. In preference to Monroe, St. Lawrence and Chautauqua, it gave an additional member to Albany, having a much smaller remainder than the others. It gave one to New York county, which had a remainder of 8,813, and one to Rensselaer, having a remainder of 24,081. Neither Albany, New York county or Rensselaer had a remainder equal to any of the eleven counties named, and in some of the cases the disproportion was very great. The inequality in the distribution of political power under this apportionment is illustrated by another form of statement contained in the opinion of Judge DWIGHT. Dutchess county, with a population less than St. Lawrence, receives double the representation of the latter; Albany county, with less than twice the population of St. Lawrence, receives four times its representation, and Monroe county, with

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24,000 more population than Albany, receives one less representative.

The question is, was this apportionment of members to counties having smaller remainders of representative population than other counties, and giving the former additional representation denied to the latter, a compliance with the command of the Constitution that the apportionment should be made "as nearly as may be" according to the number of inhabitants of the respective counties. I think the question admits of but one answer, and that it is incontestable in reason, that the constitutional rule required that the eleven members should have been assigned to the counties having the highest remainders. This would have been the nearest approximation to equality, according to population. That this is so is a mathematical certainty, and admits of no controversy.

A question identical in principle was considered by Mr. Webster in a report made to the United States senate in 1832, by a committee of that body, of which Mr. Webster was chairman, relating to the rule which ought to prevail in the apportionment of members of congress among the states. The Federal Constitution provides (Art. 1, § 3) that "Representatives and direct taxes shall be apportioned among the several states according to their respective numbers," etc. The question considered by the committee was as to the constitutional method of apportioning unassigned representatives as between states having fractions of population less than a full ratio. The committee were unanimously of the opinion that the loss of members arising from the residuary numbers should be made up by assigning as many additional members as are necessary for that purpose to the states having the largest fractional remainders, and this was the rule subsequently adopted by congress. (Webster's Works, vol. 3, p. 368.) It will be observed that the words "as near as may be" are not in the provision of the Federal Constitution, but it was the opinion of the committee that the meaning was the same as if these words had been inserted. Mr. Webster said: "The Constitution, therefore, must be understood, not as

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enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring congress to make an apportionment of representatives among the several states according to their respective numbers, *as near as may be*. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule; it takes the place of the other rule, which would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule dictated by justice and conforming to the common sense of mankind; a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule or obligation." Again (p. 379), "The Constitution, as the committee understood it, says, representatives shall be apportioned among the states according to their respective numbers as near as may be. The rule adopted by the committee says, out of the whole number of the house, that number shall be apportioned to each state which comes nearest to its exact right according to its number of people." No one can fail to perceive the analogy between the question discussed in this report to that which is involved in the apportionment now under consideration.

The argument urged upon us that the words "as nearly as may be" give a discretion to the legislature, if it means anything, as applied to the circumstances of this case, means that the legislature may disregard the plain meaning and mandate of the Constitution. I deny that the rule that apportionment must be "as nearly as may be" according to population, is, or under any circumstances can be discretionary. I can conceive that an apportionment act should not be held to be unconstitutional for

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every trivial departure from the rule of equality. Some mistakes will inevitably be made in the enumeration in the first instance, and afterwards by the legislature in making the apportionment, although it may act under the most sincere desire to apply the rule of the Constitution. But because the apportionment cannot be exact according to population, and some inequality is unavoidable, this does not absolve the legislature from applying the rule in every case, and it cannot, under the cover of the words "as nearly as may be," disregard the rule and relegate the proceeding to the domain of discretionary powers and escape its binding obligation. When the court can see that the rule of the Constitution was not in fact applied and the circumstances for its application were clear and unequivocal, then there is nothing left to the court but to declare the apportionment void. The suggestion that the circumstances under which legislatures act in such matters give opportunity for the play of passion and prejudice, and therefore this must be considered in determining the validity of an apportionment act, seems to me to have no place in this discussion. The very object of constitutional restrictions is to establish a rule of conduct which cannot be varied according to the passion or caprice of a majority, and to fix an immutable standard applicable under all circumstances. If a departure from the fundamental law by legislatures can in one case be justified by the frailties of human nature, and the constitutionality of an act may be made to depend in one case upon such a consideration, the constitutionality of all legislation may be governed by the same rule. I have said the very object in imposing restraints in the Constitution is to protect great principles and interests against the operation of such eccentric and disturbing forces. The discretion of the legislature, if any, in apportioning members, ends where certainty begins, and that point was reached when the counties having the largest remainders were ascertained. The attempt to justify the apportionment of 1892 by the fact asserted (which seems to be true), that the apportionment of 1879 was subject to as great or greater objection on the score of inequality than

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the later act, fails because the fact is irrelevant. It is one thing that a legislature has disregarded its duty on a former occasion and that the people have acquiesced in the usurpation, and quite a different and much more serious thing if such a disregard of constitutional limitation should receive judicial sanction.

Reference was made on the argument to the senate districts constituted by the Constitution of 1846, and by the convention which framed that instrument. The tables presented by the attorney-general show that the ratio for a district was about 81,000, and the greatest variations were in New York, which with four senators had a surplus of about 48,000, a little more than half enough for another senator, and in the thirtieth district, which consisted of the counties of Allegany and Wyoming, in which there was a deficiency of about 28,000. These were the two extremes. The problem to be solved had three inflexible elements preventing equality and compelling instead, approximation. The convention found in existence a senate of thirty-two members elected in eight districts or four from each. Those districts were to be changed from eight to thirty-two, each electing a single senator. That was the first condition. The next was that no county should be divided unless it was entitled to two or more senators; and the third that the districts should be composed of contiguous territory. The debates show that it was quite generally conceded that a nearer approach to equality could only be reached by enlarging the number of the districts, which the convention was unwilling to do; and no different and better apportionment consistent with the conditions was formulated by anybody, or shown to be reasonably possible. It was the opinion of the members of the convention, as shown by the debates, that no nearer approach to the equality for which they struggled could be reasonably attained. To cite a necessary inequality as a precedent for an unnecessary one, a discrepancy compelled by inexorable conditions for one which there was perfect freedom to avoid, the compulsion of an inherent difficulty for a wrong both voluntary and need-

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less, constitutes no answer to the inequalities in the assembly apportionment. If in 1846 there had been one additional senator to be allotted to some one district and such allotment had been denied to the first district with a surplus of 48,000, and given to the thirteenth, with a surplus of about 1,000, it would have been a precedent for what was done in the case at bar. The convention in projecting the new scheme was treading on unfamiliar ground, but it did not leave in doubt the rule by which future legislatures should be governed.

The departure from the constitutional method in the act of 1892, is substantial, and its validity having been challenged in the courts, it cannot be upheld without establishing a dangerous precedent for the future. The claim that the legislature in making an apportionment may take into consideration the probable unequal growth of populations, has no support in the Constitution. The apportionment is to be based on existing populations, as ascertained by the preceding enumeration. The decennial enumeration and apportionment is the constitutional remedy for any such temporary inequalities. If the legislature was permitted to act upon the ground suggested, it would introduce a most uncertain element and might be made the cover for great abuses. It is plain that in the present case the inequalities are not attributable to any such consideration. Monroe county, containing a rapidly growing city, and with a much larger population than Albany county, was given three members, and Albany was given four. It is unnecessary to consider in this case the question of the constitutionality of the act of 1892, so far as it relates to senate districts. The inequalities in some instances are very great and seem to have been unnecessary. For example, one of the districts in the city of New York has a population of 241,138 while another district in the same city has a population of 105,720, and they are not bounded by ward or election district lines. But having reached the conclusion that the apportionment act in the apportionment of members of assembly violates the Constitution, the question as to the senate districts is unimportant in the decision of this case. The act must stand

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respect to one branch of the legislative, it cannot be upheld as to the

show that the question presented. That it is a judicial question cannot be denied. The legislature and the courts must obey the Constitution, and if the legislature fundamental law and oversteps in its action the Constitution, it is a part of the duty of the judicial department shall have the power of protecting the Constitution itself. The power of the courts to set aside

apportionment has quite recently been affirmed by the courts of Wisconsin and Michigan. *Id.* vol. 51, 1133; *Id.* vol. 52, 944; *Supervisors of*

Slacker, Secy. of State, *Id.* 951.) These cases show much ability the question of judicial power, and a substantial departure in an apportionment of equality, renders it void.

the gravity of the question now presented. We cannot appreciate that holding the apportionment in the present case the law to induce temporary inconvenience, but the evils from this are not to be compared, I think, to the injury which will result from sanctioning a departure from one of the vital principles of representative government.

J., O'BRIEN and MAYNARD, JJ., concur with GRAY, JJ. ANDREWS and FINCH, JJ., dissent. It is discussed in opinion of ANDREWS, J., but concurring with PECKHAM, J., on all other points.

is directed in opinion of PECKHAM, J.

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THE PEOPLE ex rel. FRANK HASBROUCK, Appellant, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF DUTCHESS, ETC., Respondent.

Under the provision of the "Reform Ballot Law" (§ 35, chap. 262, Laws of 1890, as amended by chap. 296, Laws of 1891), prohibiting the placing of any mark upon a ballot with intent that it may be identified, and providing that if a ballot cast has upon it any mark placed upon it with such intent "by the voter, or any other person to his knowledge," it shall be void; in order to condemn a ballot, it is necessary to prove that the ballot was marked either by the voter, or by another with his knowledge, with his intent or the intent known to him of such other person, that it might afterwards be identified.

To prove the requisite facts, however, it is not necessary to call the voter, or any person acting in complicity with him, but the same may be proved like other facts by any competent evidence; nor is it necessary to show who the voter was who cast the ballot; it is sufficient if it be shown that the ballot was marked with the illegal intent by whomsoever cast.

The marks placed upon a ballot, or a series of ballots, may be of such character as of themselves to furnish strong proof that they were placed thereon for the purpose of identification, and with other circumstances, even slight, may establish the illegal intent.

Under the provision of said act (§ 31), providing for the determination by mandamus of the question as to the validity of a ballot claimed to be invalid, and prescribing the steps to be taken preliminary to the proceeding, the fact that the inspectors failed to write their names upon the ballot, will not alone, when the other prescribed steps have been taken, prevent or defeat the mandamus proceeding.

It seems that where, during or immediately after the completion of a canvass, a marked ballot is questioned as prescribed by the act, and a proceeding by mandamus is instituted as provided for, it is for the court to determine whether, under the circumstances of the particular case, there has been such a substantial compliance with the other requirements as to enable the relator to maintain the proceeding.

It seems that a candidate, intending to proceed by mandamus, should procure an alternative writ.

Where, however, a peremptory writ is applied for upon notice as required (Code Civ. Pro. § 2070), if the facts upon which the application is based are admitted, or not disputed, and are sufficient to authorize the writ, questions of law only are involved, and the writ may issue in the first instance.

Where a peremptory writ is issued, it must command precisely what, and no more than the party to whom it is directed, is legally required to do; if it requires more, while the court on application to quash may amend

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(Code Civ. Pro. §§ 721, 722, 723, 1997), it may, in its discretion, quash the writ, and the exercise of this discretion is not reviewable.

Where, therefore, the affidavits upon motion for a mandamus under said act set forth facts showing clearly that a portion of the ballots which were questioned, were marked for the purpose of identification, which facts were not disputed; but the facts stated as to the residue failed to show that the ballots were so marked, and there was no allegation that they were questioned during the canvass, and a peremptory writ was issued requiring the board of county canvassers to recount the votes and reject all of those questioned, which writ was quashed; *held*, that the writ was defective in that it required too much; and that the order quashing it was not reviewable here.

The writ was granted without notice to the board of canvassers; it appeared, and without objection made return submitting to the jurisdiction of the court. *Held*, that the objection of want of notice was only to be taken by the board and after such appearance and return it was too late for it to raise it.

(Argued October 3, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 11, 1892, which affirmed an order of Special Term, dismissing a writ of peremptory mandamus.

The board of canvassers of Dutchess county canvassed the votes cast for the office of county treasurer at the general election held in said county on November 3, 1891, rejected certain ballots on the ground that they were marked for the purpose of identification, and declared the result and filed a certificate giving the office to Frank Hasbrouck, the relator, the democratic candidate, by a plurality of thirty-seven votes. A mandamus on the relation of Isaac W. Sherrill, the republican candidate, was issued, and in obedience thereto the board of canvassers reconvened and recanvassed the votes, and made and filed the statement of canvass, giving Mr. Sherrill a plurality of seventeen votes. Thereupon the relator applied for an order to show cause why a mandamus, under section 31 of the Ballot Reform Law, should not issue. A peremptory mandamus was issued to the effect stated in the opinion, which also states the material facts.

Further facts are stated in the opinion.

Opinion of the Court, per EARL, Ch. J.

Horace D. Hofcut for appellant. Justice BARNARD's decision nullifies the provisions of the ballot Reform Law as to marked ballots, and makes the law, and not the ballots, "void and of no effect." (129 N. Y. 895.) Marking the official ballot and marking the paster ballot are both prohibited. (Laws of 1891, chap. 296, § 35.) The provisions of the Election Law (Chap. 130, Laws of 1842), requiring inspectors to attach to statements of canvass "not only the defective ballots, but a sample of all others voted, with the writing thereon, showing the number of each kind cast * * *," has remained unchanged ever since. (*People ex rel. v. Bd. Canvassers*, 126 N. Y. 402.) A peremptory mandamus was properly issued. (Laws of 1891, chap. 296, § 31.)

R. F. Wilkinson for respondent. A peremptory writ of mandamus may issue only when the relator's right is clear in law, and there is no dispute about the facts. If the facts are disputed, an alternative writ is the proper remedy. (Code Civ. Pro. § 2070; Wood on Mandamus, 31-39; *Nichols Case*, 129 N. Y. 435, 436, 442.) These objections to the sufficiency of the moving papers could be taken at any time, even upon appeal. (*C. Bank v. Canal Commissioners*, 10 Wend. 27; *People ex rel. v. Batchellor*, 53 N. Y. 128-138; *People ex rel. v. Green*, 58 id. 295, 305.)

EARL, Ch. J. By chapter 262 of the laws of 1890, as amended by the act chapter 296 of the Laws of 1891, a new system for the conduct of elections was introduced into this state. The main purpose of the system was to enable the voter so to cast his ballot that no person would know for what candidates he voted, and thus that he would be protected against intimidation and other improper influences. For the first time in this state it was made illegal for a voter to cast a ballot which had in any way been marked for identification, and such ballots were rendered void and of no effect. It is provided in section 35 that "no voter shall place any mark upon his ballot or do any other act in connection with a ballot with the intent that it may be identified as the one voted by him; no person

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shall place any mark upon or do any other act in connection with a paster ballot with the intent that it may afterwards be identified as having been voted by any particular person. When a ballot has been deposited in a ballot-box, upon which, or upon a paster affixed thereto, a writing or mark of any kind has been placed by the voter or by any other person to his knowledge, with the intent that such ballot shall afterwards be identified as the one voted by him, the same shall be void and of no effect." This section condemns a ballot, not only if it was marked for identification by the voter himself, but also if, with his knowledge or assent, it was marked for identification by any other person. Whether the ballot was marked by himself or by any other person, it is sufficient, in order to condemn it, to show his intent. When the ballot was marked by any other person, before it can be condemned, it must be shown that it was so marked with the voter's knowledge, either with his intent or the known intent of such other person that it might afterwards be identified. The facts requisite to condemn the ballot under these provisions can be proved by any competent evidence. They may be shown by the evidence of the voter, or of any other person placing the mark on the ballot, or by any competent evidence, even against the evidence of those two, sufficient to satisfy the judicial mind of the existence of the facts. The whole field of inquiry is open, as in any case where a question of fact is to be tried and determined. If the facts could be proved only by calling the voter, or some other person in complicity with him in placing the mark upon the ballot, it is manifest that these provisions of the ballot law would be substantially useless, as no other person could know by whom the ballot was cast; and thus the essential witnesses in nearly every case could not be produced. Nor can it be needful to show who the voter was who marked or cast the ballot with illegal intent. It must be sufficient to show by any competent evidence that the ballot was marked with the illegal intent by whomsoever cast. The marks placed upon a ballot or upon a series of ballots may be such as of themselves to furnish strong and persuasive evi-

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dence that they were placed upon the ballots for the purpose of their identification, and with other circumstances, even slight, they may establish the illegal intent.

While section 35 provides that such marked ballots "shall be void and of no effect," a speedy and summary proceeding for their condemnation is provided in section 31 as follows: "When an inspector of election or other election officer or duly authorized watcher shall, during a canvass of the votes, or immediately after the completion thereof, declare his belief that any particular ballot or paster affixed thereto has been written upon or marked in any way with the intent that the same may be identified, the inspectors shall write their names on the back thereof and attach it to the original certificate of canvass, and include in said certificate a statement of the specific grounds upon which the validity of such ballot is questioned. When the votes are to be estimated and the result declared by a board of county canvassers or other officers performing similar duties, such board or officers shall mention separately in the statement or certificate of canvass the number of votes thus questioned which were cast for each candidate, and the specific grounds upon which the same are claimed to be invalid as set forth in the original certificate of canvass. Such ballots shall be counted in estimating the result of an election, but within thirty days after the filing of the certificate declaring such result a writ of mandamus may issue out of the Supreme Court against the board of canvassers, or officers acting as such board by whom the ballots were counted, upon the application of any candidate voted for at the election, to require a recount of the votes; and all questions relating to the validity of such ballots, and as to whether they were properly counted, shall be determined in such proceeding. All such ballots shall be preserved for at least one year, and until the questions raised by such writ shall be finally determined. Election boards and boards of canvassers shall be continued in existence for the purposes of such proceedings."

This section provides for the performance of several acts preliminary to the proceeding by mandamus. (1) An inspector

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or other election officer or duly authorized watcher, must, during a canvass, or immediately after its completion, in substance, declare to the inspectors his belief that the ballot or paster was written upon, or marked for identification. (2) The inspectors must write their names on the back of such ballot and attach it to the original certificate of canvass. (3) They must include in such certificate a statement of the specific grounds upon which the validity of such ballot was questioned. (4) The board of county canvassers or other officers performing similar duties must mention separately in the statement or certificate of canvass made by them the number of votes thus questioned which were cast for each candidate and the specific grounds upon which the same were claimed to be invalid as set forth in the original certificate of canvass. Are all these preliminary acts matters of substance which are required absolutely to be performed before a candidate can proceed by writ of mandamus? Can the inspectors of election or the board of county canvassers prevent or defeat the proceeding by mandamus by neglecting or purposely omitting to write their names upon the ballots or to make the required statements? The proper officers are under a duty to perform these preliminary acts, and if they do not perform them, they may be criminally prosecuted for their neglect or willful disregard of the requirements of the law.

These laws should be liberally interpreted so as to promote the ends for which they were enacted, and the courts should not permit their purpose to be defeated by the innocent neglect, chicanery or willful misconduct of election officers. The law condemns ballots marked for identification, and such marking strikes at the very root of the reform ballot system, and if during the canvass, some election officer or some authorized watcher who in a sense represents the candidates of his party questions the marked ballot on the ground of the marks, the first important step has been taken. The other preliminary acts are devolved upon the election officers not representing or under the control of any candidate, and the courts in the mandamus proceeding must determine whether,

under the circumstances of the particular case, there has been such a substantial compliance with the statute as will enable the candidate complaining of marked ballots to maintain the proceeding.

A candidate intending to proceed by mandamus under section 31 should procure an alternative writ so that if there should be any dispute about facts that can be settled before the peremptory writ issues, and the opposing candidate should be permitted to intervene so as to protect his rights. If, however, a peremptory mandamus is applied for it must be upon notice (Code, § 2070), and then if the facts upon which the application is based are undisputed or admitted and are sufficient to authorize the writ, questions of law only are involved and the writ may issue in the first instance.

Having thus called attention to the law and the procedure under the law, I will now advert to the facts. The relator was the democratic candidate, and Isaac W. Sherrill the republican candidate for county treasurer in the county of Dutchess in November, 1891, and counting all the votes cast at the election the board of county canvassers certified that Sherrill was elected by a majority of seventeen. The relator claims that certain of the ballots cast for Sherrill were marked for identification and that if they are rejected he would have a majority of the legal ballots and would be entitled to the certificate showing his election. He therefore in due time obtained from a Special Term of the Supreme Court a peremptory writ of mandamus commanding the board of county canvassers to recount the ballots and reject those which he claimed were marked for identification. The writ was based on certain affidavits and upon the statement and certificate of canvass of the board of county canvassers, its certificate declaring the result of the election and all the statements and certificates of canvass of the inspectors of election for certain districts named, and it commanded the board of county canvassers to reconvene "and to recount the votes cast at said general election for said office of county treasurer, and on said recount to reject and not to count for the candidates named

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thereon for the office of county treasurer all ballots that have been marked for identification and that have been so returned and certified, and particularly the eighteen marked ballots returned from the first district of the town of East Fishkill, the one marked ballot returned from the first district of the first ward of the city of Poughkeepsie, the four marked ballots returned from the second district of the town of Red Hook, and the thirty-one marked ballots returned from the third district of the town of Red Hook."

Besides the relator's affidavit, there were affidavits of Ogden, Kniffin, Williams, Rifenburgh and Grennon. In his first affidavit Ogden stated that he was an authorized democratic watcher at the polls in the first election district of the town of East Fishkill; that he was present at the canvass by the inspectors of the votes cast in that district; that during the canvass there appeared among the ballots which were counted eighteen ballots with straight republican paster-ballots attached to the face thereof, with the name of William Rowe, the republican candidate for justice of sessions, erased from each paster by a pencil mark drawn through it and the name of some other person who was not a candidate for the office of justice of sessions written at the foot of the paster; that some of the names so written were of persons who resided in the county of Dutchess; that one name was that of a person unknown to him, and one was John Doe supposed to be a fictitious person; that during the canvass of the votes he declared his belief that each of these marked ballots and the pasters affixed thereto had been written upon and marked for identification, and that he questioned each of them on that specific ground; that he had on the day he made his affidavit examined the eighteen marked ballots returned by the election inspectors of the district to the board of county canvassers and attached to their certificate, and that they are the identical ballots objected to and questioned as before stated; that all the names written upon the pasters were in the same handwriting, and in his opinion in the handwriting of Garrett Roach, with whose handwriting he was familiar; that Roach

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was a republican worker at the polls in the district all the day of the election; that Charles W. Horton was also a resident of the district and a republican worker therein; that he, Horton, was present at the canvass of the votes by the inspectors, and when any such marked ballot appeared and was counted in the canvass, as the name of the person thus written thereon in pencil was read aloud, he entered the name so read in a memorandum book held in his hand; that he was informed and believed that Horton thus made the memorandum of the names for the purpose of ascertaining how many and what marked ballots had been cast at the election, so that he could pay the voters casting such ballots in pursuance of prior promises made to them, and that he was informed and believed that such payments were subsequently made by Horton. Kniffin and Williams each made an affidavit stating that he was a voter in the first district of Fishkill, and that before he voted Roach approached him and offered him a republican paster ballot, and asked him to vote the same; that he then and there erased from the paster the name of the republican candidate for justice of sessions, and wrote thereon with a pencil some other name, and handed the paster to him thus marked, and promised him that if he would vote the paster so marked, and if the same should come out of the ballot-box at the canvass of the votes, Horton would give him five dollars. Ogden made another affidavit that on election day Kniffin and Williams severally gave him the pasters so received from Roach, and stated to him what had taken place between them and Roach, and he attached the pasters to his affidavit. Rifenburg and Grennon joined in an affidavit in which they stated that they resided at Madalin in the town of Red Hook in the county of Dutchess; that they knew republican leaders and workers who resided in Madalin, and that after the election, they had heard them boast "that some of their men had voted right by the marked paster ballots or tickets that were voted at said election in said districts by the marks that they put upon themselves."

The facts alleged in these affidavits were undisputed, and

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there cannot be the least doubt that, as to the East Fishkill paster ballots, they showed that the pasters were marked for the purpose of identification, and to effectuate a scheme of bribery. No other purpose for marking them as they were marked can be conceived. The election of Rowe was not contested, and he could not be defeated. A different name was written upon each paster — names of persons not candidates for the office, and at least one name that of a fictitious person, and it is quite significant that all this was done upon pasters.

But this is not all. There was an official republican ballot in the first ward of the city of Poughkeepsie, headed by the name of the republican candidate for governor, with an ink line drawn above and under the name, and a check mark in ink opposite to it, and the inspectors indorsed upon that ballot "supposed to be a ticket marked for identification," but they did not write their names upon it. They, however, attached it to their certificate and made the statement required by section 31, stating that, during the canvass of the votes, it was questioned by an authorized watcher on the ground that it had been marked for identification. In the second district of the town of Red Hook there were four full republican paster ballots, on two of which Rowe's name was erased with a blue pencil, and again written at the foot of each paster with the same pencil, on one of which the name of Rowe was erased with a blue pencil, and on another the name of Calvin E. Pratt, another candidate, was erased with a black pencil and again written at the foot of the paster with the same pencil. It is impossible to conceive that these paster ballots were marked for any purpose except that of identification, and their marking seems to have been part of the same scheme worked in the town of Fishkill.

In the third district of Red Hook there were thirty-one ballots which are described in the statement made by the inspectors; each "was a republican official ballot, on the left margin of which, opposite the name of the office and candidate for attorney-general, appeared marks, as follows:" Blurred ink marks, as if made by a printer's quad. These have come to

be known as the quad ballots. There is no allegation in the record that these ballots were questioned during the canvass by the inspectors. Nor is there any allegation or proof in the record that they were marked for identification. The marks themselves do not import design, and are by themselves just as consistent with mistake as design. If there was obtainable any proof that these ballots were marked for an illegal purpose, or as part of a general corrupt scheme, that proof should have been placed before the court below as the basis of its action, and should appear in this record. Upon the case as we now have it, a peremptory mandamus could not issue to compel the board of county canvassers to reject these ballots.

The writ of mandamus was applied for and granted on the 7th day of December, 1891. On the twelfth day of December the board of county canvassers made their return to the writ at a Special Term of the Supreme Court, in which they stated what they had done prior to the issuing of the writ, and further, as follows: "That this board knows of no other duty in reference to the counting of said ballots, except as may be ordered by the court." And thereupon the court ordered the writ of mandamus to be quashed "without prejudice." It does not appear upon whose motion or upon what ground it was quashed. We are bound to assume that it was quashed upon the motion of some party who had the right to be heard, or by the judge holding the Special Term *ex mero motu*. The writ appears to have been granted without notice to the board of county canvassers, as required by the Code; but we cannot assume that it was quashed on that ground, as that was an objection to be taken only by the board, and they appeared, made their return and submitted themselves to the jurisdiction of the court without objection. It was then too late even for them to make the objection that they had not received notice of the application for the writ. We must assume that it was quashed upon some ground which, in the mind of the court, the relator could obviate, as it was quashed "without prejudice" to his right to obtain another writ. As it does not appear in the record upon what ground it was quashed, we

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must assume, for the purpose of review here, that it was quashed upon any ground available at the time. There was one obvious ground for quashing it, and that is, that the writ commanded too much, as it commanded the board of county canvassers, among other ballots, to reject and not count the quad ballots, which, as I have before stated, do not appear in this record to have been illegal. When a writ of peremptory mandamus issues, all judicial action has ceased, and the party commanded is bound to obey, and in default thereof he may be punished. He has no discretion to perform part of the acts commanded and to omit others; but he must obey the writ in the terms in which it was issued. The writ must command precisely what the party is required to do, and no more than he is legally bound to do. And if it commands more it may be quashed. Under the ancient practice a peremptory writ of mandamus, defective by commanding too much, or for not being sufficiently precise and definite, was not amendable, and the only remedy of the relator in such a case was to suffer his writ to be quashed and then obtain another. In High on Extraordinary Legal Remedies (§ 562) it is said that the better doctrine seems to be that no amendment should be allowed to the writ of peremptory mandamus, and when the writ commands more than the relator is entitled to the better practice is, instead of allowing an amendment, to set aside the order granting the writ and allow the relator to obtain an alternative writ. The authorities are abundant to show that the practice was to quash a peremptory writ which commanded too much. (*State ex rel., etc., v. Township of Union*, 43 N. J. Law, 518; *State ex rel., etc., v. Early*, 46 id. 479; *Hartshorn v. Ellsworth*, 60 Me. 276; *State v. Kansas City, etc., R. R. Co.*, 77 Mo. 143; *People ex rel. v. Baker*, 35 Barb. 105; *People ex rel., etc., v. Supervisors of Dutchess Co.*, 1 Hill, 50; *Queen v. East & West India Dock Co.*, 2 El. & Bl. 466; *King v. Church of St. Pancras*, 3 A. & E. 535; *Reg. v. Tithe Comrs.*, 19 L. J. [Q. B.] 177.) But the former practice in reference to peremptory writs of mandamus has been modified in some juris-

dictions, and it has been held in some cases that the writ may, in the discretion of the court, be amended. Under the provisions of the Code of Procedure (§§ 721, 722, 723 and 1997) the court has ample authority to grant amendments either to an alternative or peremptory writ of mandamus in furtherance of justice. The Special Term, having the parties before it, could have amended this writ by striking out the command as to the quad ballots, and, if necessary, as to all the ballots except those from the town of Fishkill, and could have enforced the writ as thus amended. But where a writ is thus defective it rests in the discretion of the court whether it will amend or quash, and the exercise of that discretion is not reviewable here. A mandamus is sometimes likened to an injunction, and if an injunction be issued which is too broad in its terms, and a motion is made on that ground to vacate it, the court may undoubtedly amend it in the exercise of its discretion. But it may, on account of the imperfection complained of, entirely vacate it and leave the party to obtain another injunction proper in form and scope. If in such a case the court, instead of amending the injunction, should entirely vacate it, no one would contend that this court had the right to review the exercise of its discretion. So, too, a mandamus has sometimes been styled a mandatory execution to carry into effect the final order of the court, and if an execution be issued in any case for too large an amount, or otherwise embracing too much, no one will question that it is in the discretion of the court to amend it or to vacate it entirely, leaving the party to take another execution; and with the exercise of that discretion this court would not interfere. This court was organized to review errors of law and not alleged errors in the exercise of discretion. (Code, § 1337.) In *People ex rel., etc., v. Fairman* (91 N. Y. 385) the relator applied for a peremptory writ of mandamus, which the court denied. And then he made a motion to have the order modified so as to permit an alternative writ to issue, and we held that the last motion was addressed to the discretion of the court, and that its decision thereon was not reviewable here.

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It may even be doubted whether the order of the Special Term quashing the writ without prejudice affected a substantial right of the relator. Here the certificate of the board of county canvassers declaring the result of the election as to county treasurer was filed, not earlier than the seventh day of December, and the relator had thirty days thereafter to procure his writ of mandamus. This writ was quashed on the twelfth day of December without prejudice, as we must assume, for the defect pointed out. He could immediately, then and there, or at any time within the thirty days, have obtained another writ proper in form, and thus the quashing of his writ without prejudice could have done him no substantial injury, so far as this record discloses. While, therefore, it is clear upon this record that the relator has suffered injustice, and that he was legally entitled, by taking the proper proceedings, to a certificate declaring his election, we do not perceive how we can give him any relief without departing from the settled practice of this court and exercising a jurisdiction not understood to be given to it.

The General Term had jurisdiction to review the order made at the Special Term, and to reverse or modify that order in case it came to the conclusion that the Special Term ought, in the exercise of a fair discretion, to have amended rather than to have quashed the peremptory writ. It is unfortunate to the relator that the time has now passed within which, under the statute, he could procure another writ of mandamus, and if he has any relief in this proceeding it is by application to the Supreme Court, and probably at the General Term, which, under the unfortunate circumstances in which he is placed, may so vacate and modify its order as to convert the peremptory writ of mandamus into an alternative writ, or to amend the peremptory writ by striking out the command as to ballots which do not appear to be illegal. We have no alternative but to dismiss this appeal.

Appeal dismissed, with costs.

All concur, except MAYNARD, J., not voting.

Appeal dismissed.

Statement of case.

PEOPLE ex rel. GEORGE W. POST, Appellant, v. ISAAC B. CROSS, Sheriff, etc., Respondent.

A fugitive from justice, surrendered to the authorities of this state by the governor of another state, may be held and tried here for a crime other than that charged in the warrant by virtue of which he was arrested and surrendered, where the act for which he was extradited and that for which he is indicted and held, is the same.

U. S. v. Rauscher (119 U. S. 407); distinguished.

The obligations of the states of the union to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the Constitution of the United States (Art. 4, § 2), and is not limited to specific offenses but embraces all crimes; and as the condition that the state to which a fugitive is surrendered cannot try him for any other offense than that charged in the warrant of extradition is not expressed therein it cannot be implied.

Where, therefore, in proceedings by habeas corpus, it appeared that the relator was extradited from Wisconsin, upon a requisition of the governor of this state, which stated that the relator stood charged with grand larceny upon an indictment here found, that after his return to this state the indictment for grand larceny was quashed and he was held upon an indictment for robbery in the first degree, both indictments being based upon the same acts. *Held*, that no principle of comity between the states, nor any legal right secured to the relator had been violated; and so, that his detention was legal.

Reported below, 64 Hun, 848.

(Argued October 5, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made June 1, 1892, which affirmed an order of the Special Term dismissing a writ of habeas corpus.

The facts, so far as material, are stated in the opinion.

John H. Gleason for appellant. Where a fugitive from justice is extradited from a foreign country he can be held and tried only for the offense for which his extradition was obtained. (*United States v. Rauscher*, 119 U. S. 407; *Commonwealth v. Hawes*, 13 Bush, 697; *State v. Vanderpool*, 39 Ohio St. 273; *United States v. Watts*, 8 Sawy. 370; *Blandford v. State*, 10 Tex. App. 627; *Ex parte Hibbs*, 26 Fed. Rep.

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421; *In re Reinitz*, 7 N. Y. Crim. Rep. 74; *Kentucky v. Dennison*, 24 How. [U. S.] 109; *Taylor v. Taintor*, 16 Wall. 370; *Ex parte Virginia*, 100 U. S. 347, 359; *Ex parte Shield*, Id. 391.) There is no distinction on principle between foreign extradition under a treaty not limiting by express terms the trial of a fugitive from justice to the particular offense for which his extradition was obtained and interstate rendition pursuant to the provisions of the Constitution and statutes of the United States. (*In re Hope*, 7 N. Y. Crim. Rep. 406; *In re Buruch*, Id. 325; 2 Moore on Extradition, 1048; *State v. Hall*, 40 Kans. 338; *Ex parte McKnight*, 28 N. E. Rep. 1034; *In re Fittan*, 45 Fed. Rep. 471; *In re Cannin*, 47 Mich. 481; Spear on Extradition, 527-552.)

James W. Eaton, District Attorney, for respondent. The weight of authority in this country is concededly against the motion of relator to be discharged under this writ. (*State v. Stewart*, 60 Wis. 587; *Ham v. State*, 4 Tex. App. 645; *In re Noyes*, 17 Alb. L. J. 407; *Williams v. Weber*, 28 Pac. Rep. 21; *Hackney v. Welch*, 107 Ind. 253; *Dow's Case*, 18 Penn. St. 37; *Browning v. Abrams*, 51 How. Pr. 172; *Adriance v. La Grave*, 59 N. Y. 110; *State v. Buzine*, 4 Harr. 572; U. S. R. S. §§ 5278, 5279; *Lawrence v. Brady*, 56 N. Y. 182; *In re Clark*, 9 Wend. 219; *Draper v. Pinkerton*, 17 Hun, 199; 2 Moore on Extradition, 1042.) There is no analogy between international and interstate extradition, and hence the rule laid down in *United States v. Rauscher* (119 U. S. 407) does not apply. (*Kentucky v. Dennison*, 24 How. [U. S.] 66; *In re Noyes*, 17 Alb. L. J. 407; *In re Miles*, 52 Vt. 409; *Ham v. State*, 4 Tex. App. 645; *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; *Dow's Case*, 18 Penn. St. 37; *Taylor v. Taintor*, 16 Wall. 370; *Ex parte Virginia*, 100 U. S. 347, 359; *Ex parte Shield*, Id. 391.)

O'BRIEN, J. The relator, George W. Post, in his petition, alleges that he is unlawfully restrained of his liberty, and imprisoned in the county jail of the county of Albany by the

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sheriff. Upon his application, a writ of habeas corpus was issued to inquire into the cause of the imprisonment, and having been served upon the sheriff in whose custody the relator was, a return was made thereto, in substance, that the relator was held by him in custody, as such sheriff, by virtue of a bench warrant issued and delivered to him by the district attorney of the county of Albany, upon an indictment duly found in the Court of Oyer and Terminer, whereby the relator was charged with the crime of robbery in the first degree. To this return the relator answered denying that the imprisonment was legal, as alleged by the sheriff, and also set forth the following facts as constituting the true cause of the detention.

That in February, 1889, the relator was indicted in the Court of Sessions of Albany county for the crime of grand larceny in the first degree. That afterwards, and in October, 1891, when the relator was a resident and inhabitant of the state of Wisconsin, and sojourning therein, he was arrested upon a warrant issued by the governor of that state, upon the requisition of the governor of New York, in which requisition it was stated that the relator stood charged, upon an indictment in the state of New York, with the crime of grand larceny in the first degree, committed in the county of Albany, and that the relator had fled from the state having jurisdiction of the crime charged, and had taken refuge in the state of Wisconsin, and demanding the return of the relator, pursuant to the Constitution and laws of the United States. That after such arrest, upon the warrant of the governor of Wisconsin, the relator was delivered to an agent, appointed by the governor of New York for that purpose, and conveyed to Albany for trial upon the indictment. That afterwards he was arraigned upon the indictment and pleaded not guilty, and committed to the custody of the sheriff, by whom he was held and imprisoned till about the 21st of April, 1892, when the indictment for grand larceny in the first degree, upon which the relator was arrested in Wisconsin, was set aside and quashed. That on the same day, the district attorney issued a bench warrant to the sheriff upon the indictment for robbery, which was found subsequent

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to his extradition from Wisconsin, and that by virtue of that warrant alone, the relator was detained in custody at the time of his application for the writ of habeas corpus. The district attorney admitted the facts stated in the answer or traverse of the relator to the return, except some immaterial allegations with reference to the first indictment, and, upon what was virtually a demurrer to the relator's traverse, the question was submitted to the judge before whom the writ was made returnable, who dismissed it and denied the prayer of the petitioner and remanded him to the custody of the sheriff. This order has been affirmed at the General Term. It was admitted in the courts below, and is here, that the relator is held in custody for the same criminal act which constituted the ground of the requisition by the governor of this state upon the governor of Wisconsin, and of his extradition from that state. In the warrant of the governor of Wisconsin, and in the requisition of the governor of this state, that act was designated as grand larceny in the first degree, while in the indictment and warrant, under which the relator was held when he applied for the writ of habeas corpus, it was designated as the crime of robbery in the first degree, and the question is whether a fugitive from justice surrendered to the authorities of this state upon their demand, pursuant to the Constitution and laws of the United States, by the governor of another state, can be held or tried here for any other crime than that charged in the warrant, by virtue of which he was arrested and surrendered in the state to which he had fled, although the act for which he was extradited and that for which he is now indicted and held in this state is the same. The obligation of independent nations to surrender fugitives from justice to each other when demanded, rests either upon international comity or the stipulations of express treaty. When, upon the former, there is and can be no general rule as to the duty of the government upon which the demand is made save its own sense of justice and regard for what is due to its neighbors. When, upon the latter, the obligation is discharged by the surrender of persons properly charged with the specific offenses

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provided for in the treaty. Whether fugitives from justice extradited from foreign countries for offenses against the United States or any of the states could be tried when brought within the proper jurisdiction for any offense except that charged in the papers upon which the accused was surrendered by the foreign government was, until quite recently, a question that produced much conflict of judicial authority. The Supreme Court of the United States has settled the question, so far as concerns the obligations due to foreign nations, or to persons surrendered by them, upon the demand of the federal government pursuant to treaty stipulations. (*United States v. Rauscher*, 119 U. S. 407.)

In that case it appeared that Rauscher was surrendered by the government of Great Britain to the United States, upon its demand, for murder committed upon the high seas, an offense of which its courts had jurisdiction, and that he was subsequently tried and convicted of another and minor offense, namely, the cruel and inhuman punishment of the same seaman, and thus the act for which he was extradited and tried was the same.

It is urged by the learned counsel for the relator that this is a controlling authority in the case at bar. But we think that there is a material distinction between the facts and circumstances of that case and those disclosed by the record before us. It must be noted in the first place that much stress was laid in that decision, and very properly, upon the fact that, by the act of congress relating to extradition from foreign nations upon the application of the federal government, it is expressly provided that the person surrendered shall not, when brought to this country, be tried for any other or different offense. This is the construction given to the act in the case last cited. (119 U. S. p. 433; U. S. R. S. § 5275.) The act of congress passed in pursuance of the Federal Constitution is the supreme law of the land, and this law protected Rauscher from trial for any other offense than the one upon which he was surrendered to this government by the British authorities. Moreover the laws of Great Britain, from which jurisdiction

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the fugitive had been extradited, forbid the surrender by that government of persons charged with crime in other jurisdictions, to countries under whose laws the person demanded was liable to be tried for some other or different offense than that charged in the application for extradition. (33 and 34 Vict. Ch. 52; *Adrianse v. Lagrave*, 59 N. Y. 115.) And, therefore, when the United States took the fugitive from the protection of those laws its faith and honor was pledged, at least impliedly, to the effect that it would not permit its courts to try him for any other offense, even though it might be of a lesser grade than that upon which he was surrendered. Furthermore, the offense for which Rauscher was actually tried, was not one which Great Britain had bound itself by the terms of the treaty with this country to surrender him. It may very well be that had he been charged in the application for extradition with only the offense for which he was tried, that the government within whose jurisdiction he was found would have refused to surrender him to the authorities of the United States. It would, therefore, seem to be clear that his trial for another offense was in violation of the faith and honor of the government, as well as of an express law of congress. These considerations are not applicable to the case now before us. The obligations of the states of this Union to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the plain provisions of the Federal Constitution, found in art. 4, § 2, as follows: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he has fled, be delivered up to be removed to the state having jurisdiction of the crime." The obligation thus imposed upon the states is not, like treaties between independent nations, limited to specific offenses, but embraces all crimes, and if the demanding state, when the fugitive is surrendered to it, cannot try him for any other offense than that charged in the warrant of extradition, that is a condition that must be implied, as it is not expressed in the instrument creating the obligation.

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Whether a fugitive from justice can be tried in the state from which he has fled, and to which he has been surrendered, for any other offense than that charged in the application to the governor of the surrendering state is a question upon which much conflict of authority is to be found in the courts of the several states and in the inferior courts of the United States, as the Federal Supreme Court has not yet, so far as I am informed, passed upon the point. We are asked in this case to hold that the rule must be the same in cases of interstate and international extradition, and that the principles which control the latter have been announced in the *Rauscher* case. We are not prepared to hold that the doctrine of that case is necessarily applicable to this. There were reasons for that decision that do not exist in this case, some of which we have already pointed out. It may be proper to add, also, that the act of congress regulating interstate extradition, does not provide that the fugitive surrendered shall be exempt from trial upon any other charge, while that regulating international extradition does, according to the construction given to it by the highest federal court, as we have seen. (U. S. R. S. §§ 5278, 5279; *Rauscher Case*, *supra*.)

It was competent for congress to insert the same, or a similar provision, in the statute regulating extradition between the states as that regulating extradition from foreign nations, but it is somewhat significant that it has not done so. The states, though sovereign and supreme in their domestic affairs and as to all matters not conferred by the Constitution of the United States upon the federal government, bear relations to each other with respect to the question now under consideration, somewhat different from that of foreign and independent nations. Possibly it would be competent for the states to enact that persons charged with crime in other states should not be taken from the jurisdiction where they are found, unless by the law of the demanding state they are not liable to be put upon trial for any other offense than that charged in the demand for his surrender. But I am not aware that any of the states have enacted such regulations. On the contrary,

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the highest court of Wisconsin, the state from which the relator was demanded and received, has held that a fugitive from justice surrendered to another state upon demand, under the Constitution, may be tried in the state from which he fled, for any other offense of which its courts may have jurisdiction. (*State ex rel. v. Stewart*, 60 Wis. 587; *Adrianse v. Lagrave*, *supra*.)

As this is the law of that state it is difficult to see how any rule of comity has been disregarded by reason of what has been done in the case at bar. We do not think it necessary in this case to decide the question as to whether there is a distinction to be observed in cases of interstate and international extradition, with respect to the trial of the person extradited for another and different offense. We think that as the charge upon which the relator is now held, though designated as robbery, is based upon the identical act for which he was surrendered by the governor of Wisconsin, and then designated as grand larceny, that no principle of comity between the states, nor any legal right secured to the relator has been violated.

For these reasons the order appealed from should be affirmed.

All concur.

Order affirmed.

MARY J. BURNETT, Appellant, v. CHARLES S. WRIGHT, as
Executor, etc., Respondent.

Where it appears from an instrument, when construed in its entirety, that it was intended as a security for a debt, although there is no express provision that upon the fulfillment of the condition, the conveyance shall be void, it is a mortgage and if the amount secured is left indefinite and uncertain, this may be shown by any competent proof *dehors* the instrument.

An instrument which plaintiff sought to reform and to foreclose as a mortgage was in the usual form of a real estate mortgage; it was signed, sealed, and was duly acknowledged and recorded as a mortgage; it recited a money consideration of \$800; it contained a defeasance clause as follows: "This grant is intended as security for the payment of the sum of ——— in one year from the date of this instrument with interest

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semi-annually, and this conveyance shall be void if such payment is made as herein specified." The court held that the amount intended to be secured could not be shown by parol and that the mortgage was void for uncertainty; that an action to foreclose could not be maintained without a reformation of the instrument, and that an action to reform was barred by the Statute of Limitations and so dismissed the complaint. *Held*, error; that plaintiff was entitled to prove by parol the amount intended to be secured; also that the instrument, without correction or reformation, was a valid mortgage and enforceable as such, as in the absence of other proof, it may be presumed that the consideration expressed, correctly represents the sum secured.

(Argued October 7, 1892; decided October 18, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This was an action for the reformation of an instrument alleged to be a mortgage and to foreclose the same.

The facts, so far as material, are stated in the opinion.

Martin W. Cooke for appellant. The court erred in finding that the instrument set out in the complaint and intended as a security for the debt, as proved, was void for uncertainty, and that the omission of the amount secured constituted a patent ambiguity which prevented a recovery without reformation by the insertion of such amount in the instrument. (*Smith v. Jackson*, 11 Hun, 361; *Strong v. Mitchell*, 4 John. Ch. 167; *Lane v. Shears*, 1 Wend. 433; *Spencer v. Spencer*, 95 N. Y. 353; *Hare v. Fisher*, 2 Barb. Ch. 559; *Horn v. Keteltas*, 46 N. Y. 605; 1 Jones on Mort. [2d ed.] §§ 309, 362, 353; *Hughes v. Edwards*, 6 Wheat. 489; *Drummond v. Prestman*, 12 id. 515; 1 Greenl. on Ev. § 288; *Carr v. Carr*, 52 N. Y. 251; *Gill v. Pinney*, 12 Ohio St. 38; *Tousley v. Tousley*, 5 id. 78; *Hurd v. Robinson*, 11 id. 232; *Hodgson v. Shannon*, 44 N. H. 572; *Griffin v. Cranston*, 1 Bosw. 281; *Jackson v. Bowen*, 7 Cow. 13, 19; *Baxter v. McIntyre*, 13 Gray, 168.) The court erred in holding that the action to

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recover was barred by the Statute of Limitations. (*Brockway v. Wells*, 1 Paige, 616.)

D. B. Beach for respondent. It was indispensable for plaintiff to ask for a reformation and correction of this defective mortgage before it could be enforced, and she came into a court of equity for that purpose. (*Avery v. Willis*, 24 Hun, 548; *Eaton v. Wilcox*, 41 Hun, 61-66; *Vandanoort v. Dewey*, 42 id. 71; 2 Pars. on Cont. 557, 563; *Syms v. Mayor*, 18 J. & S. 280; *Cramer v. Benton*, 4 Lans. 294; 60 Barb. 216; *Thomas v. Harmon*, 122 N. Y. 84; *Bruce v. Tilson*, 25 id. 194. The failure of plaintiff or her assignor to take any step to enforce this moribund security for nearly twenty years, of itself subjects the claim to well founded suspicion. (*Hubbell v. Sibley*, 50 N. Y. 473; Angel on Lim. [6th ed.] 21, 465, §§ 453, 454; *Hoyt v. Putnam*, 39 Hun, 403; *Burnett v. Gould*, 27 id. 366.) Plaintiff's counsel contends that this mortgage could and should be converted and transformed into a deed; this is untenable. (*Horn v. Keteltas*, 46 N. Y. 606.) The ten year statute of limitations was properly pleaded. (*McTeagus v. Coulter*, 6 J. & S. 208; 3 Pom. Eq. Juris. [1st ed.] 412, §§ 1375, 1376.)

MAYNARD, J. The plaintiff was defeated at the Special and the General Term on the ground that the instrument which she sought to foreclose was defective as a mortgage and was void for uncertainty and that the objectionable defects could not be supplied by parol proof. The writing which was executed by the testator of the executor defendant to the assignor of the plaintiff on January 31, 1868, is set out in full in the complaint and is in the usual form of a real-estate mortgage. It recites a money consideration of six hundred dollars, is signed, sealed, and duly acknowledged, and was recorded as a mortgage in the proper county. It contains a provision for the defeasance of the grant if payment of the sum which it was intended to secure, should be made within one year from its date with semi-annual interest, and the ordinary

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power of sale if default should be made in the payment of the principal sum thereby intended to be secured, or of the interest thereof, or any part of such principal and interest, with the authority to retain out of the proceeds the amount then due for principal and interest with the costs and charges of the sale and to pay the overplus, if any, to the mortgagor his heirs or assigns. The amount of the mortgage debt is not stated in the defeasance clause, but is left in blank, and the sentence in which it occurs is as follows: "This grant is intended as a security for the payment of the sum of —— in one year from the date of this instrument, with interest payable semi-annually, and this conveyance shall be void if such payment is made as herein specified."

The complaint contains all the necessary allegations to support an action for the foreclosure of a mortgage and also alleges that the omission to fill up this blank was unintentional, and the first part of the prayer for relief is the usual demand for a judgment of foreclosure, and it concludes with a request that the mortgage may be adjudged to be reformed to comply with the intention of the parties. The action was commenced November 9, 1887, and the defendants interposed the plea of the Statute of Limitations, averring that both ten and twenty years had elapsed since the cause of action had accrued.

The trial court has found the due execution, delivery and recording of the mortgage as alleged; that the mortgagor was then indebted to the mortgagee in the sum of six hundred dollars; that the mortgage was given to secure the payment of such indebtedness, and that no part thereof has been paid and that the mortgage had been duly assigned to the plaintiff. There was a further finding, classed as a finding of fact, that the mortgage was defective; that the defect consisted in the omission to insert in writing in the blank the amount of the debt that was to be secured by it, and that the instrument should be reformed by inserting such amount, and that the action to foreclose the mortgage could not be maintained until it was reformed. As conclusions of law it was found that the

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mortgage was void for uncertainty ; that the defect in it was a patent ambiguity, and consequently the amount intended to be secured could not be shown by parol evidence, and that the action to reform the mortgage was barred by the Statute of Limitations, and that the complaint should be dismissed, and directed judgment accordingly. Judgment was thereupon entered dismissing the complaint and adjudging the mortgage void for uncertainty, and directing the clerk to make the following entry upon the record thereof. "This mortgage adjudged void for uncertainty and the remedy to reform, enforce and foreclose the same barred by the Statute of Limitations."

We think that this judgment was the result of a misapprehension of the legal force and effect of the instrument which is the foundation of the plaintiff's action. Upon the findings it must be held that this conveyance at the time of its delivery possessed all the attributes of a valid mortgage and became a good and enforceable security for the mortgage debt without the necessity of correction or reformation.

Perhaps the most concise and satisfactory definition of a mortgage is that given by Washburn in his work on Real Property (Vol. 2, p. 43), where it is stated to be: "Any conveyance of land intended by the parties at the time of making it to be a security for the payment of money or the doing of some prescribed act." It has also been said that to constitute a mortgage only two things are necessary, a conveyance of property and a cotemporaneous agreement that such conveyance shall be a security. (Thomas on Mortgages, § 13, p. 10.)

The defeasance need not be in writing at all, but may be established by parol testimony, and as was stated by Judge ALLEN in *Horn v. Keteltas* (46 N. Y. 605), it is now too late to controvert the proposition that a conveyance which is even absolute upon its face may in equity be shown by parol, or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief, and to give effect to the intention of the parties. He declares

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that the courts of this state are fully committed to this doctrine and that it has become a rule of property which cannot safely be departed from.

In the earlier case in the Supreme Court, of *Tibbs v. Morris* (44 Barb 138), Judge GROVER held that where loans are made and securities for repayment taken, such cases are in equity an exception to the general rule that the rights of the parties to a written contract must be determined by the terms of the instrument without resort to parol proof, and that it might be shown by extrinsic evidence that the transaction was in fact a loan, and that the conveyance was intended as a security for its repayment; and effect will be given to it accordingly. The plaintiff was, therefore, entitled to the benefit of whatever parol proof might be available to impress the character of a mortgage upon the instrument executed by the defendant's testator. Such evidence is not necessarily proffered for the purpose of establishing a right to a reformation of the deed; but in order to show that it was in fact a mortgage at the time of its execution; and that it has all the qualities and incidents of a defeasible grant. If the defeasible clause of the instrument is void for uncertainty, it cannot reasonably be claimed that the grantee is in a worse condition than if it had been wholly omitted, for being void it is as if it had not been inserted, and as it relates to a matter which need not be reduced to writing, the parties may by parol proof, make certain and definite that which through inadvertence, or otherwise, they have failed to intelligently express in the conveyance itself.

But, without a resort to extrinsic facts, we think there is sufficient appearing upon the face of the instrument in question to clearly establish its legal status as a valid mortgage.

The rule of construction is correctly laid down in *Jones on Mortgages* (Vol. I, p 49, § 69): "If it appears from the whole instrument that it was intended as a security, although there be no express provision that upon the fulfillment of the condition the deed shall be void, it is a mortgage. The substance and not the form of expression is chiefly to be regarded, and

an enlarged and liberal view is to be taken of the instrument in order to ascertain and carry into effect the intention of the parties."

Rejecting the sentence which contains the obnoxious blank, the paragraph conferring upon the grantee the power of sale expressly declares that the deed is intended as a security for some debt due from the grantor. This is enough to make it *prima facie* a mortgage. The particular debt need not be described but can be shown by any competent proof *dehors* the instrument. If it had stated that it was given to secure a debt due from the mortgagor to the mortgagee to be paid in one year with interest, without specifying any sum, it could scarcely be contended that the mortgagee could not be permitted upon foreclosure, to point out the exact obligation which the parties agreed at the time of the execution of the mortgage should be secured by it. Or if the sum stated in the mortgage differs from the amount actually intended to be secured, it cannot be doubted that the true sum may be established by independent proofs. As the securing of the mortgage debt is the real consideration of the conveyance, it is but another application of the familiar rule that the consideration of a deed is always open to inquiry, especially where it tends to uphold and not to defeat the conveyance.

There is another sufficient answer to the objection which has been made to plaintiff's right of recovery.

The instrument upon which she relies must be read and construed in its entirety. Omissions and ambiguities in one part may be supplied or explained by reference to other parts, if the necessary data can there be found for that purpose. The sum stated in the defeasance clause is intended to be the amount of the debt to be secured by the mortgage which is but another form of expressing the consideration of the grant. The indefiniteness, therefore, occasioned by the failure of the parties to fill up the blank in this paragraph of the deed, may be removed and the sum intended to be secured ascertained by a reference to the consideration clause of the instrument; for generally the consideration named in a mortgage is the

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amount of the debt secured by it. (Jones on Mortgages, p. 43, § 64). It is not controlling or conclusive, if a different sum is stated in the condition of the grant, or is otherwise shown to have been the true consideration. But in the absence of other proof it may be presumed that the consideration correctly represents the sum to be secured. It is the office of that part of the conveyance to denote the inducement of the grant and until disproved it may be relied upon to perform that service.

This appeal comes here upon the judgment-roll alone, and we have no information from the record whether any parol evidence was admitted upon the trial, or, if admitted, whether it was considered by the learned trial judge in making up the findings of fact.

But the introduction of the mortgage would be sufficient in the first instance to establish the existence and amount of the mortgage debt, and unless overborne by other competent testimony impeaching its correctness, furnishes a satisfactory support to the finding that the debt secured corresponded in amount with the consideration expressed. It may fairly be inferred from the argument of counsel that some parol proof upon the subject was given at the trial; but it was not necessary for the plaintiff to resort to it as a part of her affirmative case. The instrument upon which she brought this action was therefore not fatally defective as a mortgage and she was entitled upon the findings to a judgment of foreclosure.

A new trial must be granted, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JANE A. McDOUGALL et al., as Admrs., Respondents, v. THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY of New York, Appellant.

Under the provision of the act regulating the forfeiture of life insurance policies (Chap. 841, Laws of 1876, as amended by chap. 821, Laws of 1877), which requires notice to be given in the manner and as specified, before a policy may be declared forfeited, where a policy is out of the ordinary form, a notice which contains statements reminding the assured of the time and place when and where to make any payments required by the terms of the contract, the amount thereof and the effect of non-payment is sufficient, although it does not follow literally the words of the statute.

Defendant issued a policy insuring the life of McD. for one year from July 23, 1884. The policy contained an agreement on the part of defendant "to renew and extend this insurance during each successive year" upon condition that the assured pay, on or before July twenty-third in each year, a "mortality premium" and a specified "expense charge." In an action upon the policy, it appeared that a notice was seasonably mailed by defendant to the assured prior to July 23, 1888; this stated the amount to be paid, the place where, and the person to whom the payments were to be made; that they would become due and payable on that date, and that "in order to continue and extend the insurance, it will be necessary that the payments required for that purpose shall be paid on or before the date above mentioned as stipulated in the policy contract." The payments were not made, and the assured died in November of that year. *Held*, that the notice was a sufficient compliance with the statute; and that plaintiffs were not entitled to recover.

Phelan v. N. M. L. Ins. Co. (118 N. Y. 147), distinguished.

McDougal v. Pro. Sav. Soc. (64 Hun, 551), reversed.

(Argued October 14, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1892, which denied defendants' motion for a new trial, overruled exceptions ordered to be heard in the first instance at General Term, and ordered judgment for plaintiff upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

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David B. Hill and *Edwin B. Smith* for appellants. The policy upon which this suit is brought is a contract of a peculiar character, pertaining exclusively to the exceptional nature of the business done by the defendants. If, according to its terms, there was no attempt to forfeit a right belonging to the deceased, and no obligation to send the notice prescribed by the act of May 23, 1877 (Chap. 321), or if the notice actually sent was a substantial compliance with the requirements of that statute—in either event, the plaintiffs cannot recover. (Bacon on Ins. § 18.) The act of 1877 (Chap. 321) did not seek to enjoin or favor any one method of life insurance, nor to injure or prejudice any method; nor to dictate any form or terms of contract beyond this—that no company should assume, by stipulation or otherwise, to declare a forfeiture of any policy, by reason of nonpayment of a due premium, without first giving the prescribed notice. If, by any method of insurance and under a particular form of policy, no premium ever became due, so as to be a debt to the company; and the assured had no vested interest in the policy (by reason of premiums paid) to be forfeited; the statute could not apply to such cases. (*Lord v. Dall*, 12 Mass. 115; *Fowler v. Metrop.*, 116 N. Y. 396; *Dermott v. Jones*, 2 Wall. 8.) The purpose of the statute was to regulate and to remedy a mischief in life insurance as generally known to be conducted in this country. (*N. Y. v. Statham*, 93 U. S. 24.) The statute should be confined to that class of insurance which it fits, and not be distorted to cover the class which it does not fit. (*U. S. v. S. Bank*, 6 Pet. 36; *Carr v. Thompson*, 67 Mo. 472; *Scudder v. Coryell*, 10 N. J. L. 410; *Allen v. Patterson*, 7 N. Y. 480; *Leggatt v. Bank*, 24 id. 286.) The defendant gave a notice substantially complying with the statute. (Laws of 1877, chap. 321.)

J. H. Stevens for respondents. Both parties having requested a direction of the verdict, it should be sustained, if the evidence is such that the jury would have sufficient evidence to have supported a verdict for the same amount.

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(*Howell v. Wright*, 122 N. Y. 667; *Bulger v. Rosa*, 29 N. Y. S. R. 678; Laws of 1877, chap. 321, § 1; Laws of 1876, chap. 341; *Baxter Case*, 119 N. Y. 450.) The notice mailed was not a compliance with the statute, and was, therefore, mere nullity. (*Phelan v. N. W. M. L. Ins. Co.*, 113 N. Y. 147; *Carter v. B. L. Ins. Co.*, 110 id. 15.) The acceptance of the proofs without objection entitles the plaintiff to claim that the defendant cannot now successfully claim that there was no contract of insurance. (*Armstrong Case*, 42 N. Y. S. R. 558; May on Ins. § 468.) It was not necessary to tender the \$206.80, claimed to be the premium unpaid on July 23, 1888, that amount being deducted from the recovery, there is no harm to the defendant. (*Baxter v. B. L. Ins. Co.*, 119 N. Y. 450, 457; *Dennings v. Knight*, 38 N. Y. S. R. 979.)

GRAY, J. This action is to enforce the payment of the sum secured in a policy of insurance, issued by the defendant to the plaintiffs' intestate on July 23, 1884. By its terms the defendant promised to pay to the assured, or to his legal representatives, the sum of \$10,000, within ninety days after satisfactory proof of his death, "provided such death shall occur before 12 o'clock noon on the 23d day of July, 1885." Defendant further promised "to renew and extend this insurance during each successive year from the date thereof, upon condition that the assured shall pay, on or before the twenty-third day of July in each successive year during the continuance of the contract, the mortuary premium, ———, and also an expense charge of three dollars on each \$1,000 insured therein; the payment of said annual mortuary premium and the annual expense charge being the consideration for the continuance of the insurance in each successive year," etc.

It is plain that this policy was a contract for an insurance for the term of one year only, providing, however, by its terms, for its renewal for successive years upon compliance by the assured with the conditions named. Renewals were effected during the years 1885, 1886 and 1887, but the assured failed to make those payments on July 23, 1888, which were

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required in order to extend his policy over another year, and he died in November following. His administrators have rested, and must rest, their right to a recovery upon the proposition that the defendant did not give to the assured the form of notice prescribed by a statute of this state as a prerequisite to the right to declare a policy of life insurance forfeited.

The defendant, in support of its appeal from the judgment which the plaintiffs have succeeded in recovering, presents two grounds. It denies that the statute in question applies to such a policy, and it insists that, if it does, the notice, which was in fact given to the assured, was sufficient. That statute (being chapter 321 of the Laws of 1877, amending chapter 341 of the Laws of 1876) provides that "No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on said policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured." Omitting the description of the part of the notice for the payment of an unpaid premium, and declaring a forfeiture if the notice is not complied with, the final proviso reads: "Provided, however, that if a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least 30 and not more than 60 days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

Upon the construction of this statute the appellants' counsel has made an elaborate argument, to the effect that it cannot be applicable to this kind of a contract. With much ability he has analyzed its provisions and insists that they must refer, by force of the language used, to the ordinary policy of insurance,

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which is to be kept in force, until the happening of the event assured against, by regular payments, annually, or at short stated periods. In the continuance of such a policy the assured has a vested interest; by reason of the fact that his annual payments are calculated and fixed at amounts to cover more than a risk from year to year and go to form a reserve, or accumulated fund, to be offset against insurance in after years and which will enable the insurer to make eventual payments. The learned counsel argues that the mischief to be remedied by this statute is the forfeiture of such a vested interest; whereas, in this policy, the insurance agreement is for a term of one year; the payment was for such a risk and it constituted no consideration for any insurance beyond the expiration of the term.

The question is an interesting one and its solution might not be free from difficulty; but, inasmuch as the appellant must succeed upon the second ground advanced, we do not think it necessary to pass upon the question. We should hesitate to call in question the applicability of the statute to any class of life insurance policies. It was intended to and, undoubtedly, does subserve a useful purpose, in throwing about the contract between the insurer and the assured reasonable safeguards against a forfeiture or the lapsing of the interest of the assured. But we fail to perceive that any substantial requisite was wanting in the notice which the company gave to the assured. The notice was seasonably mailed and stated that "the premium, as stated below, on your policy No. 13,302 in this society will become due and payable at this office on the 23d day of July, 1888. In order to continue and extend the insurance it will be necessary that the payments required for that purpose shall be paid on or before the date above mentioned as stipulated in the policy contract." Then follow statements of the place where, and the persons to whom payments may be made and of the amounts making up a net amount to be paid. This notice would seem to be very definite in its statements; but the respondents say, and the court below has thought, that it is not in conformity with the provisions of the

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statute, for not literally following the statutory language. In support of this, they cite *Phelan v. Northwestern Mutual Life Insurance Co.* (113 N. Y. 147), where this court held a notice insufficient. The notice there was that "the conditions of your policy are that payment must be made on or before the day the premium is due and members neglecting so to pay are carrying their own risk;" and what was condemned was the use of language not intelligible to all. To say that persons are "carrying their own risk" is not plainly embodying the notice which the statute requires and might be incomprehensible to those unlearned in insurance phraseology. But in this case, as the appellants' counsel has clearly shown, the notice to be given could not closely conform to the statute; inasmuch as the yearly method of insurance was of a special character. The notice was to remind the assured of the privilege he possessed of electing to have the contract continued and extended over the ensuing year and of the conditions of its exercise. It could not state that if the "premium" was not paid, the policy and all payments thereon will become forfeited and void; for that would not be accurate. Something more than a premium was to be paid to extend the contract of insurance and, therefore, the company notified him that certain "payments" were necessary for that purpose. The obligation of the statute must not be unreasonably insisted upon. It provides for the giving of a notice, which shall be unambiguous and intelligible to all. When applied to an insurance contract out of the ordinary form, it secures to the assured such a notice as will contain statements reminding him of when and where he is to make any payments pursuant to the terms of the contract, their amount and the effect of non-payment. The statute was not meant to operate harshly upon the insurer, but to afford a protection to the assured, by the reasonable requirement of a notice, couched in plain terms, from the insurer, before the interest of the assured could be forfeited. To hold that where every essential fact required to be known is intelligibly stated in the notice, it may be disregarded, if not literally following the words of the statutory

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provision, would be a most harsh and unwarrantable construction. Its words are readily capable of being used in the ordinary cases of insurance contracts; but in cases not precisely had in view and where some regard must be had to the nature of the contract itself, it is sufficient if the essential information, intended to be afforded by the statute, is found in the notice actually given. If the provisions of the act are to be extended in their application to the case of a contract made for the insurance of a life for the term of twelve months, the flexibility of its language must certainly admit the sufficiency of a notice from the insurer in conformity with that contract.

For these reasons we conclude that it was error for the court below to order judgment for the plaintiffs on the verdict.

The order of the General Term and the judgment entered thereon should be reversed and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS, J., not sitting.

Judgment accordingly.

JAMES J. GEARNS, Administrator, etc., Appellant, v. THE
BOWERY SAVINGS BANK, Respondent.

Payment by a savings bank of a deposit to a person not entitled to receive it, though he may have possession of the bank book and present it, will not discharge the bank, if at the time of payment a fact or circumstance was brought to the knowledge of the bank officers, calculated to excite the suspicion of and inquiry by an ordinarily careful person, and they failed to make inquiry or to exercise at least ordinary care and diligence.

In an action by plaintiff, as administrator of the estate of M., to recover the balance of a deposit account with defendant, as such administrator, the latter pleaded payment, and proved that said balance had been paid to one K., a person unknown to defendant's officers, upon presentation by him of the pass book, together with a paper purporting to be a power of attorney, executed by plaintiff in his individual capacity, wherein he was described as executor of the will of P., and which although it gave the correct number of the pass book, by its terms authorized K. to draw all moneys on deposit with defendant credited to plaintiff as such executor. It appeared that K. obtained possession of

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the pass book and procured plaintiff's signature to the power of attorney by fraud. Plaintiff's counsel requested the submission to the jury of the question as to whether defendant acted with ordinary care and diligence in making such payment which was refused. *Held*, error; that as the alleged power of attorney, upon its face, did not relate to the deposit in question, and conferred no power upon K. to draw the money or upon defendant to pay it to him, this might furnish reasonable grounds for suspicion and, under the circumstances, the question of defendant's negligence should have been submitted to the jury.

(Argued October 14, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 8, 1891, which affirmed a judgment in favor of defendant entered upon a verdict.

This was an action to recover of defendant, the Bowery Savings Bank, the sum of \$1,335.06, with interest, alleged to be standing to the credit of plaintiff as administrator of the estate of Mary Ann Gearns, deceased, on defendant's books.

The facts, so far as material, are stated in the opinion.

Victor J. Dowling for appellant. The power of attorney, upon which defendant relied, was invalid and should not have been admitted in evidence. (*Craighead v. Patterson*, 72 N. Y. 284.) The defendant had utterly failed to prove the exercise of due care and caution on its part in making said payment. (*Smith v. B. S. Bank*, 101 N. Y. 58; *Appelby v. E. C. S. Bank*, 62 id. 12; *People v. T. A. S. Bank*, 98 id. 663; *Welsh v. G. A. Bank*, 73 id. 424; *Allen v. W. S. Bank*, 69 id. 314; *Kummel v. G. S. Bank*, 127 id. 488; *Boone v. C. S. Bank*, 84 id. 88.) The learned justice, before whom this case was tried, erred in refusing to allow the question of the use of proper care and diligence by the defendant to go to the jury, when requested so to do by plaintiff's counsel. He also erred in his charge to the jury in removing from their consideration all questions of the use of proper care by the bank officials, as well as in his refusal to direct judgment as requested by plaintiff. (*Appleby v. E. C. S. Bank*, 62 N.

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Y. 12; *Allen v. W. S. Bank*, 69 id. 314; *Smith v. B. S. Bank*, 101 id. 58; *Kummel v. G. S. Bank*, 127 id. 488; *Farmer v. M. S. Inst.*, 15 N. Y. Supp. 235; *Clark v. S. S. Bank*, 17 id. 215; *Wall v. E. I. S. Bank*, 19 id. 194.)

Carlisle Norwood for respondent. The letter of attorney presented to defendant by Keeler with the book when payment was demanded and made was properly received in evidence. (*Atkins v. Elwell*, 45 N. Y. 753; *Herty v. S. M. Co.*, 35 Hun, 116; *Staats v. H. R. R. R. Co.*, 39 Barb. 298.) The second assistant secretary of the bank was clearly competent to give his opinion as to the genuineness of the disputed signatures without ever having seen the plaintiff sign his name. (1 Greenl. on Ev. §§ 576, 577, 578, 581; *Doe v. Suckermore*, 5 A. & E. 730; Best on Ev. § 239; *Rogers v. Ritter*, 12 Wall. 317; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 523; *Miles v. Loomis*, 75 id. 288; *Rogers v. Shaler*, Anthon, 149; *Smith v. Sainsbury*, 5 C. & P. 196; *Solita v. Yarrow*, M. & R. 133; 7 C. & P. 595.) The claim of a direction of a verdict for plaintiff on the ground that the bank had been negligent was properly overruled. (*Israel v. B. S. Bank*, 9 Daly, 507, 509; *Schoenwald v. M. S. Bank*, 57 N. Y. 418; *Appleby v. E. Co. S. Bank*, 62 id. 12.)

O'BRIEN, J. At the time of the death of Mary Ann Gearns, in the month of February, 1882, there was on deposit to her credit with the defendant about \$1,500. This deposit was evidenced by a pass book which the defendant had delivered to her and which contained a statement of the account. It was to be repaid by the defendant under certain rules and regulations prescribed by the trustees, which it must be presumed the depositor assented to and form part of the contract between the parties. These rules so far as they bear upon the question involved in this case, provided that all deposits should be entered upon the books of the bank, and that a pass book should be given to the depositor, in which the sum deposited should be entered, and should constitute

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the voucher and evidence of the property of the depositor in the bank. They also provided that all payments made to persons producing the deposit book should be deemed good and valid payments to depositors respectively. On the first of December, 1885, the plaintiff was appointed administrator of Mary Ann Gearns, the original depositor, by the surrogate of New York and two days thereafter he presented the pass book in which the deposit had been entered at the bank, with a certificate of the surrogate showing his appointment as administrator, and thereupon the defendant transferred to his credit, as such administrator, the amount of the deposit with the accrued interest, amounting to the sum of \$1,769.06. The defendant also took from the plaintiff a receipt for that sum, as administrator, and issued to him, in that capacity, a new pass book in which that sum was credited, and the old book was surrendered. On July 27, 1886, the plaintiff drew from the bank from this deposit \$434 giving his receipt therefor, as administrator, and no other sum was paid to the plaintiff. This action was brought to recover the balance and the plaintiff has been defeated. It appears that the balance amounting to \$1,552.86, including interest, on the fourth day of February, 1889, was paid by the defendant to one Keeler, an attorney, and the validity of this payment as against the plaintiff, was the question litigated at the trial. It was shown that Keeler presented the pass book to the defendant together with a paper purporting to be a power of attorney from the plaintiff. It purported to bear the signature of the plaintiff, not in his representative but only in his individual capacity. The plaintiff, however, denied that he ever signed it and the genuineness of the signature was the only question submitted to the jury. The evidence was conflicting, and as the verdict was in favor of the defendant the plaintiff is concluded by the finding. The evidence would seem to indicate that if the plaintiff signed the paper his signature was procured by fraud, but if the defendant had the right to and did act upon it the circumstances under which the signature was obtained would not change its liability.

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The instrument also purported to be acknowledged before Keeler himself, as a commissioner of deeds, but the plaintiff testifies that he never acknowledged it, and Keeler was not produced at the trial, nor does it appear where he is farther than a statement in the brief of the learned counsel for the appellant that he is a fugitive from justice. The plaintiff was also at the time that the money was drawn from the bank by Keeler, and at the date of the instrument, the executor of the will of Patrick J. Gearns, deceased. The language of the power of attorney, so far as the same is material here, is as follows: "Know all men by these presents that I, James J. Gearns as executor of the last will and testament of Patrick J. Gearns, deceased, have made, constituted and appointed and by these presents do make. constitute and appoint William A. Keeler attorney at law my true and lawful attorney for me, in my name, place and stead, hereby authorizing him to draw all moneys credited to me as executor of the estate of Patrick J. Gearns, deceased, now in the Bowery Savings Bank in the city of New York, as appears from bank book No. 610,460; and likewise my said attorney William A. Keeler hereby is granted full power and authority to draw and receive from the Bank for Savings in the city of New York all moneys due me as executor and administrator of the estate of Patrick J. Gearns, deceased, as may appear due me by the bank book No. 547,881, and also all moneys now to my credit in the Emigrant Industrial Savings Bank, as shown in book 166,271, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof."

Apart from the fact that this instrument bore the signature of the plaintiff individually, and not as the personal representative of the original depositor, and that the person whose

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name was subscribed to it was described in the body of the paper as the executor of another estate or interest, it did not confer any power to demand or receive payment of the deposit in question. The fund to which it referred was that of another person, namely, that credited to the plaintiff as the executor of Patrick J. Gearns, deceased. It is true that the power refers to bank book No. 610,460, which was the number by which the deposit in question was designated, but that was merely descriptive of the deposit to which the paper related, namely, that of Patrick J. Gearns, deceased. The instrument, therefore, upon its face conferred no power upon the attorney to demand payment of the deposit in question, nor any authority upon the defendant to make payment to him. The defendant's justification for paying the deposit to Keeler must rest upon the circumstance that he had possession of the pass book, which evidenced the deposit, and presented it to the defendant when he demanded the fund. Unless it is protected by this fact and the rule under which the deposit was received, the defense must fail. It is well settled, however, that payment made to a person who is not in fact entitled to draw the deposit, though he may have possession of the book and present it at the time of payment, will not discharge the bank, unless it exercised at least ordinary care and diligence in paying the money to the wrong person. If at the time a fact or circumstance was brought to the knowledge of the defendant's officers which was calculated to and ought to have excited the suspicion and inquiry of an ordinarily careful person, it was clearly their duty to institute such inquiry, and their failure to do so presented a question for the consideration of the jury. (*Appleby v. Erie County Savings Bank*, 62 N. Y. 12; *People v. Third Avenue Savings Bank*, 98 id. 663; *Allen v. Williamsburgh Savings Bank*, 69 id. 314; *Boone v. Citizens' Savings Bank*, 84 id. 88; *Smith v. Brooklyn Savings Bank*, 101 id. 58; *Kummel v. Germania Savings Bank*, 127 id. 488.)

On the trial the plaintiff's counsel requested the court to submit to the jury the question whether, under all the facts and

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circumstances disclosed, the defendant's officers, in making the payment, exercised that degree of care and diligence which the law imposed upon them. This request was denied and the plaintiff's counsel excepted. The learned trial judge did rule that though the power of attorney should be found to be a forgery, as claimed by the plaintiff, still the defendant would be protected by the payment made, if, in making it, due care and caution was observed, and that he would submit that question to the jury if the defendant so requested, but otherwise not. The defendant's counsel announced that he did not desire to go to the jury on that question. The learned judge held, therefore, as the record shows, that while the defendant might protect itself by proof of due care in making the payment, yet the absence of such care was not an element to be considered in determining the plaintiff's right to recover. This, we think, was error. The defendant paid the deposit to a person who, upon the evidence, obtained possession of the pass book and procured the signature of the plaintiff to the power of attorney by fraud if he signed it at all. It turned out that the power of attorney was defective in form in that it did not in terms authorize the payment of the fund in question, but related to another and different fund. The defendant could then fall back upon the defense that payment was made to the holder of the book, and hence the question of negligence was involved in this branch of the defense. So the plaintiff, when he failed to satisfy the jury that the signature to the power of attorney was forged, could still urge that, though the signature was genuine, it had been procured by fraud, and that by the terms of the instrument, whether genuine or not, no power was conferred upon the beneficiary named therein to draw this money, nor any authority upon the defendant to make payment as it did. If it was proper to submit the question of negligence to the jury at the request of the defendant, it was at least equally proper and competent to submit it to the jury at the request of the plaintiff. It could not be submitted in either case unless there were facts and circumstances from which an inference could

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be drawn one way or the other. The person who presented the book was a stranger who evidently deemed it necessary to arm himself with something more, and with it he presented a paper which purported to contain authority to draw money from three savings banks credited, not to the owner of this deposit, but to another estate, and which, when examined with the requisite care, might furnish reasonable ground for suspicion. It is not the province of this court, or of any other court dealing with questions of law, to determine the weight and effect of the circumstances brought to the attention of the defendant's officers by the presence of the person in the bank to whom payment was made with the book and the so-called power of attorney, nor to point out the inferences which a careful and prudent man might be expected to draw from them. It is sufficient to say that in our opinion they were of such a character as to require their submission to the jury.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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LAURA F. BRADHURST, Appellant, v. AUGUSTA C. FIELD et al.,
as Executor, etc., Respondents.

To uphold a legacy by implication, the inference from the will of the testator's intention to give the legacy must be such as to leave no hesitation in the mind of the court, and to permit of no other reasonable inference.

The will of B. directed his trustees to invest an amount of money sufficient to realize an income of \$3,000 annually, and to pay such income to plaintiff during her life. By a codicil, after reciting his marriage to plaintiff since the making of the will, and that he had since "said marriage advanced to her large sums of money" for the declared "object and purpose to secure her such further sum as may be necessary for her support," he revoked the clause giving the annuity, and then provided as follows: "I further provide and give, devise and bequeath to my said wife, and direct my said trustees shall pay to her the sum of ten thousand dollars, and the same shall be in lieu of dower in my said estate." In an action for the construction of the codicil, *held*, that it simply gave to plaintiff the sum specified, not an annuity of that

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amount; and that, as there was no ambiguity in the provision, it was not competent to receive evidence to explain it.

In re Vowers (113 N. Y. 569), distinguished.

(Argued October 6, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Frederic Kernochan for appellant. In construing a will, when the testator's intention or general plan is clearly shown in the testamentary paper, this intention or general plan must control. (1 Redf. on Wills, 454; *Phillips v. Davies*, 92 N. Y. 199; *Ritch v. Hancock*, 114 id. 512; *Colton v. Colton*, 127 U. S. 300.) Although the intention must be gathered from the instrument itself, extrinsic evidence is always receivable (to put the court in the position of the testator at the time he executed the same) in construing the words by which he attempts to carry out his testamentary intention. (1 Redf. on Wills [4th ed.], 569, 579; Schouler on Wills, 572, 589; *In re Hastings*, 6 Dem. 307.) The very form and construction of the testamentary instrument (will and codicil), and the very words the testator uses, force the conviction that the provision intended for plaintiff must be the bequest of an income, and not of a single sum. (*Hard v. Ashley*, 117 N. Y. 606; *Kellogg v. Mix*, 37 Conn. 243; *Thurber v. Chambers*, 66 N. Y. 48.) In order to carry out the intention of the testator, in view of the facts and circumstances alleged in the amended complaint (and which in this proceeding are admitted as true), the court must construe the direction given to the trustees to be a direction to pay to plaintiff the sum of \$10,000 annually during her natural life, if such a construction of the words that testator has used is possible. (*McCorn v. McCorn*, 100 N. Y. 513.) The intention of the testator being unmistakable,

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viz., to provide a support for plaintiff, his wife, and the facts and circumstances showing that the plaintiff was entirely without any support whatever at the time the codicil was executed, the court must construe the words of direction to the trustees so as to effectuate this intention, if the words will bear this construction. (*Phillips v. Davies*, 92 N. Y. 204; *In re Vowers*, 113 id. 572; *Roe v. Vingut*, 117 id. 212; *Tilden v. Green*, 130 id. 29; *Colton v. Colton*, 127 U. S. 300; *Metcalf v. Framingham*, 128 Mass. 374; *Bradlee v. Andrews*, 137 id. 500; *Goddard v. Whitney*, 140 id. 92; *Phelps v. Phelps*, 143 id. 570.) When the third clause of the codicil is read in close connection with the third clause of the will (as it should be), it is evident that the third clause of the will is not entirely revoked, but only so much and such parts of it as provide for the payment of the annual sum of \$3,000 to Mrs. L. F. Seyton. (*Hard v. Ashley*, 117 N. Y. 606.)

Abram Kling for respondents. The codicil of decedent clearly expresses his intention to revoke the third clause of his will and to give to his widow the sum of \$10,000 in lieu of dower. (*Pierpont v. Patrick*, 53 N. Y. 591; *Austin v. Oakes*, 117 id. 598; *Hard v. Ashley*, Id. 613; *Viele v. Keeler*, 129 id. 190.) There being no ambiguity in the terms of the will and codicil extrinsic evidence is not admissible. (10 N. Y. Supp. 454.)

Per Curiam. The plaintiff brought this action to obtain a judicial construction of the will of her husband Thomas C. P. Bradhurst, deceased, and the object sought to be accomplished was to have a trust declared in the executors; under which she should be paid the sum of \$10,000 annually during her life. At the trial a motion was made for judgment upon the complaint, on the ground that no cause of action was set forth; and the question is, whether upon the allegations the plaintiff showed herself entitled to maintain such an action and to adduce evidence to establish her right to the construction claimed. By the third clause of the will testator directed his trustees to invest an amount of money sufficient to realize an

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income of \$3,000 annually from the investment, and to pay such income to Mrs. L. F. Seyton, in semi-annual payments, during her life. By a codicil to his will he provided as follows, viz.:

“*Third*. I have by the third clause of my will provided that there shall be paid to Mrs. L. F. Seyton during the term of her natural life the sum of three thousand dollars, and as I have since my making of my said will become married to her, and have since my said marriage advanced to her large sums of money, and as it is my object and purpose to secure her such further sum as may be necessary for her support, I therefore revoke and declare void the said third clause or subdivision of my said will, which provides for the payment of the said sum of three thousand dollars to said Mrs. L. F. Seyton and each part thereof.

“*Fourth*. I further provide and give, devise and bequeath to my said wife, and direct my said trustees shall pay to her the sum of ten thousand dollars, and the same shall be in lieu of dower in my said estate.”

The will is unskillfully drawn and, as the appellant's counsel points out, nothing in it calls for any trust scheme, or for the appointment of any trustees. But he argues that an examination of the will forces the conviction that the testator's main intention is to provide a support for the plaintiff, which object is also stated in the codicil, and that to effectuate his intention we must read into the whole instrument a trust scheme for the plaintiff's support, by means of an income paid to her for life. He insists that the codicil does not revoke the trust scheme of the will and that the court should construe the bequest of the \$10,000 as a substituted bequest of such a sum annually. He contends that such a construction could and would be given, if the court were put in possession of extrinsic evidence as to all the facts and circumstances relating to the testator's estate and family and to the matters alleged in the complaint. As we read the will, however, we find no ambiguity, which calls for the admission of any evidence, and we think that we have no warrant in its language for turning a plain gift of a sum of

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money into a trust for the annual payment of an income equal to that sum.

The third clause of the codicil unmistakably revokes the third clause of the will and though it speaks of a purpose "to secure her such further sum as may be necessary for her support" that is either the expression of a purpose to be effectuated outside of a testament, or it is an inapt expression to indicate the subsequent legacy of \$10,000. We have gone quite far in upholding a legacy by implication; but, in the *Matter of Vowers' Will*, an illustrative case, we laid down the rule that to uphold a legacy by implication, the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to permit of no other reasonable inference. So there, where the language was, "This provision to be accepted by my wife in lieu of her dower right and distributive share in my estate, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same;" and the widow made her election rejecting the provision, we held that she was entitled to such share of the personal estate as the law would have given her had the deceased died intestate. The frame and tenor of the will were such as to render the words "her distributive share of my estate" meaningless, unless they were given some force as being actually descriptive of a certain quantity of interest in the intestate's property. But we have here no necessity as calls upon us to give effect to pertinent and accurate language. We have neither language appropriate to the scheme of a trust for the plaintiff's life, nor language from which we could reasonably infer such a plan.

The conclusion we have reached is that there was no room for construction in the testator's last testament and that we should be doing violence to that rule which forbids the court from making a new will for the testator, if we were to sustain this appeal.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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EDWIN YOUNG, as Executor, etc., Respondent, v. JAMES D. LEARY, Appellant.

Defendant guaranteed the performance by one McK. of a contract contained in a charter party, under which he hired a propeller from the W. S. Co., for one year from October 17, 1884, to be used in southern waters. McK. agreed to insure the vessel for one year for a certain amount, and assumed "all fire, marine and other risk of damage that may happen to said vessel, * * * which is not covered by fire and marine insurance," so provided for. McK. procured the insurance as agreed. Subsequent to October 17, 1885, the vessel was burned at sea. In an action upon the guaranty *held*, that the risks assumed by McK. were only such as were not covered by the insurance which he agreed to and did procure, and were limited to the period included in the charter party, and so, no liability was incurred by him or by defendant under said clause of the instrument.

By the charter party McK. agreed, on termination of the charter, to deliver the vessel to the company in New York harbor. *Held*, that to this agreement a condition was implied of the continued existence of the vessel, and in case it was destroyed without fault of McK. before breach of the agreement, so that delivery was impossible, he was excused therefrom.

Harmony v. Bingham (12 N. Y. 99), distinguished.

But *held*, that as McK. failed to deliver the vessel at the end of the term, if the failure was not excused, there was a breach of the agreement, and the subsequent destruction of the vessel without his fault furnished no excuse for such breach.

Defendant claimed that the obligation to deliver by October 17, 1885, was waived. It appeared that sometime prior to the expiration of the year, while the vessel was in southern waters, negotiations were in progress between the parties, in which defendant participated, for the purchase of the vessel by McK., and that during such negotiations the time for the delivery passed. Subsequent to that time terms of sale were agreed upon and a mortgage was sent to McK., to execute as security for part of the purchase price. These negotiations were finally abandoned, and thereupon the vessel was sent north to be delivered, and was burned while on the way. The referee substantially found that there was a waiver of punctual delivery at the end of the term occasioned by delay in the negotiations for a purchase, but decided that such waiver was not material, as defendant, although a surety, was a party to the transactions causing the delay. *Held*, error; that if there were such a waiver and the time for delivery impliedly extended until a reasonable time after failure of the negotiations, and if during such extended time the loss

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occurred without the fault of McK., there was no breach of the agreement on his part, and so no liability of defendant as his surety. Defendant, after the expiration of the term and prior to the sending of the vessel north for delivery, procured an insurance upon her against loss by fire, for his own benefit, as the referee found; this he collected and retained the money for his own use. *Held*, that this did not render him liable under the pleadings in this action.

(Argued October 6, 1892; decided November 29, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 5, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This was an action upon a guaranty.

The facts, so far as material, are stated in the opinion.

Esek Cowen for appellant. The referee committed a grave error in holding that the covenant to return the vessel in good condition was an absolute engagement to return it in any event, or pay the owner its value in case of a failure to return. McKay, the charterer, was not liable in case of destruction by fire, without negligence or fault on his part, and *a fortiori*, the defendant, as surety, was not liable. (3 Black. Comm. 453; *Foster v. Essex Bank*, 17 Mass. 500; *Ames v. Belden*, 17 Barb. 513; *Hyland v. Paul*, 33 id. 241.) This judgment for the value of the vessel and interest cannot be sustained, as the fire which destroyed this boat was not due to any negligence or fault of the defendant's principal. (Schouler on Bail, § 23; *Wilson v. S. P. R. R. Co.*, 62 Cal. 172; *Lamb v. C. & A. R. R. & T. Co.*, 46 N. Y. 278; *Wylie v. N. Bank*, 119 U. S. 370; *Clafin v. Meyer*, 75 N. Y. 762; *Collins v. Bennett*, 46 id. 491.)

A. T. Clearwater for respondent. The claim was one that could be assigned. The assignment was valid and the action properly brought by the plaintiff's testator. (Code Civ. Pro. §§ 1909, 1910.) The Washburn Steamboat Company had the power to assign the claim to the plaintiff's testator. (*Peterson*

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v. *C. Bank*, 32 N. Y. 20; *Bank of Augusta v. Earle*, 13 Pet. 519.) In the absence of proof of the character of the law of another state the presumption is that it corresponds with ours, and the court, in the absence of allegations and proof of a foreign law, will apply our own to the case. (*McBride v. F. Bank*, 26 N. Y. 450; *Savage v. O'Neil*, 44 id. 298; *Cutler v. Wright*, 22 id. 472; *Cheeney v. Arnold*, 15 id. 353; *Monroe v. Douglass*, 5 id. 447; *Cohen v. Kelly*, 3 J. & S. 42; *C. S. Bank v. Bidwell*, 29 Barb. 345; *Robinson v. Dauchy*, 3 id. 20; *Sherrill v. Hopkins*, 1 Cow. 103.) The plaintiff's testator had the legal right to purchase the claim, subject only to the equitable right of a non-assenting stockholder, or a creditor of the Washburn Steamboat Company to set aside the assignment before innocent third parties were prejudiced. And this was so, notwithstanding the fact that he was a director, and present and voted for the resolution directing the assignment. (*Cornell v. Clark*, 104 N. Y. 451; *Barnes v. Brown*, 80 id. 528.) The defendant, having received the benefits of the contract, is not in a position to raise the question that the assignment by the Washburn Steamboat Company to the plaintiff's testator was *ultra vires*. (*D. M. Co. v. Roeber*, 106 N. Y. 473; *R. L. R. Co. v. Roach*, 97 id. 378; *Mayor, etc., v. Sonneborn*, 113 id. 426; *Mayor, etc., v. Huntington*, 114 id. 633; *W. A. Co. v. Barlow*, 68 id. 34; *Palmer v. C. H. Cemetery*, 122 id. 435; Morawetz on Priv. Corp. §§ 142, 144; *Douglas v. Bawles*, 94 U. S. 104; *Palmer v. Lawrence*, 3 Sandf. 161; *Brower v. Appleby*, 1 id. 161; *C. Society v. Perry*, 6 N. H. 164; *Williams v. Cheney*, 3 Gray, 220; *L. Bank v. Jacoby*, 10 Hun, 143; *C. Bank v. Smitt*, 17 id. 487; *Henriquez v. D. W. I. Co.*, 2 Ld. Raym. 1535; *Dunn v. Van Houton*, 5 Hals. 270; *C. Society v. Perry*, 6 N. H. 164; *A. S. Church v. Lovott*, 1 Hall, 213; *John v. F. Bank*, 2 Black, 367; *Ryan v. Valandingham*, 7 Ind. 416; *Dutchess v. Davis*, 14 Johns. 245; *Hartrant v. Bank*, 2 Mo. 269; *Hughes v. Bank of Somerset*, 5 Litt. 47; *W. M. Inst. v. Harding*, 11 Cush. 385; *W. C. Co. v. Hathaway*, 8 Wend. 480; *U. S. Bank v. Sterns*, 15 id. 316; *People*

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v. *R. Co.* 20 Barb. 518; *C. Bank v. Smith*, 9 Abb. Pr. 168.) The defendant not having pleaded that the plaintiff was not the real party in interest cannot avail himself of that defense on the trial. (*White v. Drake*, 3 Abb. [N. C.] 133.) The plaintiff's testator was the real party in interest, and the assignment cannot be attacked collaterally. (*Sheridan v. Mayor, etc.*, 68 N. Y. 30; *Morris v. Tuthill*, 72 id. 375; *Brown v. Rychman*, 12 How. Pr. 313; *Fosdick v. Groff*, 22 id. 158; Pom. on Rights & Rem. 160; 1 E. D. Smith, 142; 4 How. Pr. 204; *Durgin v. Ireland*, 14 N. Y. 322; *Meagher v. Claghorn*, 44 id. 349; *Allen v. Brown*, Id. 231; *Cummings v. Morris*, 25 id. 627; *Bank of New Haven v. Perkins*, 29 id. 554; *Brown v. Penfield*, 36 id. 473; *James v. Chalmers*, 6 id. 208; Pom. on Rem. 209.) The contract of suretyship was duly executed and the defendant having had ample opportunity to acquaint himself with its contents is estopped from denying the validity of its execution. (*Phillip v. Gallant*, 62 N. Y. 256; *Fox v. Parker*, 47 Barb. 541; *Grant v. Hotchkiss*, 26 id. 63; *Ruggles v. Holden*, 3 Wend. 216.) The contract of surety has not been vitiated by any act of the parties to either agreement. (42 N. Y. 44; *Anderson v. Read*, 106 id. 333; *Brady v. Cassidy*, 104 id. 147; *Dietz v. Farish*, 79 id. 520.) The construction of a contract of a surety is the same as of other contracts. (62 Barb. 351; 3 Wend. 216; 63 N. Y. 383; 7 Pet. 113; *Gates v. McFee*, 3 Kern. 232; *Poppenhusen v. Seeley*, 3 Keyes, 150; *Hamilton v. Van Rensselaer*, 43 N. Y. 24; *Melick v. Knox*, 44 id. 677; *Bank v. Strever*, 18 id. 502; *In re Lawrence*, 2 How. 426; *In re Lee*, 10 Pet. 482; *In re Bell*, 1 Hun, 169; *In re Mauran*, 16 Pet. 528.)

PECKHAM, J. The questions in this case arise out of a charter party executed on the 17th of October, 1884, by the Washburn Steamboat Co., and one McKay, for whom the defendant became surety. The company on the day mentioned let and McKay hired the steam propeller called the Alicia A. Washburn, of which the company was the owner,

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for the term of twelve months from October 17, 1884, to be employed in lawful trade between Key West and other points on the West Florida coast on the terms and conditions mentioned in the charter party. Among other provisions thereof was one by which McKay agreed to procure a fire and marine insurance policy for \$27,000 for one year on such boat, in the name of the company and to pay the premium thereon as an additional consideration of the charter. McKay also agreed to pay a certain rent per month for the use of the boat, commencing on the 17th of October, 1884, and also agreed that on the termination of the charter he would "deliver the said steam propeller to the Washburn Steamboat Company, or their legal representatives, in New York harbor in the same good condition as she is now in, ordinary wear and tear excepted." Another provision in the charter party was as follows: "That said McKay hereby assumes all fire, marine and other risks of damage that may happen to said vessel and also assumes all liability of every kind and nature, for which said propeller or its owners may be responsible during the term of this charter, which is not covered by fire and marine insurance hereinbefore mentioned.

McKay procured in the name of the company a fire and marine policy of insurance upon the vessel for \$27,000, for one year from October 17, 1884, and paid the premium thereon as he had agreed to do in the charter party.

The vessel was burned at sea in January, 1886.

The defendant, subsequent to October 17, 1885, but prior to the time when the vessel was sent north, caused her to be insured against loss by fire for the sum of \$17,000, and the vessel, when destroyed by fire, was insured in favor of defendant for that sum, which he thereafter collected and has since retained for his own use and benefit. The defendant claims that, by reason of certain facts which will be hereafter adverted to, the plaintiff or his assignor waived the exact fulfillment of the agreement of McKay to deliver the vessel to the company on the 17th of October, 1885.

The company duly demanded of the defendant that he

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should cause the vessel to be delivered to it or pay the value thereof, which defendant omitted to do. The company then assigned its claim to Thomas Cornell, who commenced this action to recover from the defendant the value of the vessel because of the failure of McKay to deliver it to the company on the 17th of October, 1885, as he had agreed to do. Subsequent to the commencement of the action Cornell died, and it was thereupon duly revived in the name of the plaintiff as the executor of the will of Cornell. The action was tried before a referee, who gave judgment in favor of the plaintiff for the value of the vessel, \$22,000, and interest thereon from the 17th of October, 1885, and also the sum of \$1,232.34, with interest from same date, being the amount due and unpaid for the use and hire of the vessel. The judgment having been affirmed at the General Term the defendant has appealed here.

Before adverting to the facts which occurred while the vessel was in the possession of McKay, the charterer, it will be convenient to determine the nature and extent of his obligations by virtue of the charter party.

He agreed that he would procure a fire and marine insurance policy for one year in the name of the steamboat company for \$27,000 and pay the premium thereon. It is conceded that he did so. This policy expired, by its terms, on the 17th of October, 1885, and it was not renewed. There is no provision of the charter party providing for any renewal of such a policy. He also assumed during the term of the charter all fire, marine and other risks of damage that might happen to the vessel not covered by fire and marine insurance as thereinbefore mentioned. Also all liability during the same term of every kind and nature for which the vessel or its owners might be responsible. Thus during the period of the running of the charter party the risks of McKay, as assumed by him, were only such fire, marine or other risks of damage as were not covered by the fire and marine insurance which he had already agreed to, and which in fact he did procure. What such risks were is not very material, although there are risks

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not covered by such a policy. At any rate, as McKay procured the policy which he agreed to procure, and for the period agreed upon, no liability for the loss of the vessel attaches to him under this clause of the charter party. The cause of the loss, we may assume, was from one of the risks which would have been covered by the fire and marine policy had that policy been in force. It had expired by its own limitation, and McKay was under no obligation to renew it. He had never in terms assumed a liability to refund for a loss of this kind. His agreement to respond for losses not covered by the insurance policy spoken of was limited to the period included in the charter party, one year from October 17, 1884. Thus, from whatever cause the loss occurred, the liability of McKay (and consequently of defendant) must be sought from some other clause of the charter party than the one now spoken of.

Another obligation assumed by McKay was to pay the rent as mentioned in the agreement, but there is no materiality in that liability so far as this question is concerned.

The remaining obligation of McKay under this charter party is contained in that provision by which he agreed in the language already quoted, to deliver the vessel to the company in New York harbor.

It has been claimed on the part of the plaintiff in the courts below, and it is now urged here, that this promise to deliver was on its face an absolute and unconditional one and a failure to fulfill it would not be excused by the entire destruction of the vessel before breach and without fault on the part of the charterer. It is true that the vessel was not destroyed at the time when by the terms of the original promise McKay had bound himself to deliver it in New York harbor. The question is whether the contract to deliver was absolute and only to be complied with by an actual delivery within the time agreed upon, or whether a destruction of the thing hired before breach and without the fault of him who hired it would not absolve the latter from his contract. If it would there is the further question whether the facts herein do not show

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a waiver of the contract to deliver at the specified date and an implied extension of the time for such delivery and the destruction of the vessel within the time thus extended without the fault of the hirer. Or at least whether the facts proved were not enough to permit a finding of the fact of such waiver and extension.

The case of *Harmony v. Bingham* (12 N. Y. 99) is one of the leading cases of that class which must have controlled the judgments of the courts below in the case at bar. It was there reiterated as a principle well founded in the law of contracts, that inevitable accident or any unforeseen contingency not within the control of the party promising was no defense to an action founded upon the express promise to do the thing and a failure of performance. An act of God, it was said, would excuse a party from performing a duty created by law, but not where such party had unconditionally engaged by express contract to perform. It is argued that here is an express promise to deliver this vessel in the harbor of New York, and as the promise was not fulfilled the promisor is liable and hence the liability of the defendant as his surety. We do not think that the law applicable to the class of cases of which that of *Harmony v. Bingham* (*supra*) is a conspicuous example applies here.

The contract in this case comes as it seems to us under another class which relates to the hiring for use of the thing hired and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused. If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand and without fault on the part of the bailee, he is excused. (*Williams v. Lloyd*, W. Jones, 179; *Sparrow v. Sowgate*, Id. 29.) Mr. S. Martin Leake in his Digest of the Law of Contracts, at page 706, says: "The authorities estab-

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lish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the default of the contractor."

Several cases are referred to in support of this proposition. Among them are those in the note to *Hall v. Wright* (96 Eng. Com. L. R. 745, at bottom of page 795); *S. C.* (EL, BL. & EL. 745); *Taylor v. Caldwell* (3 Best & Smith, 826); *S. C.* (113 Eng. C. L. 826). BLACKBURN, J., says, in last case, that the implication in an express contract of this nature that the thing itself shall be in existence when the person is called upon to fulfill his contract, tends to further the great object of making the legal construction such as to fulfill the intention of the parties to the contract, for in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. (See also *Appleby v. Myers*, L. R. [2 Com. Pl.] 650, per BLACKBURN, J., 658.) There is no question that a party can, if he so please, bind himself to deliver, notwithstanding the thing may perish, which he contracts to deliver. He does not thus bind himself by the use of the ordinary language as contained in this charter party. The above cases show this to be true.

When language like that found in this agreement is used, the condition of continued existence is implied, and as thus interpreted it creates nothing more of an obligation than that which the law raises without any such promise. When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction

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itself, the party using the language is no further bound than he would have been without it. So it was held in the case of *Ames v. Belden* (17 Barb. 513), where the defendant was sued for its value for not returning a steamboat according to the condition of the charter party, by which defendant agreed to return the same at the expiration of the term in as good condition as it then was, excepting ordinary use and wear. The court said the language must be held to have reference to the ordinary obligation of such a bailee to return the article hired, and defendant was exempt if before the time arrived the article had been destroyed without his fault. This is only another way of saying that an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and if in the meantime it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed. The case is thus entirely supported by the cases above cited.

To the same effect is the case of *Hyland v. Paul* (33 Barb. 241).

The same principle has been held operative in covenants or agreements contained in leases of real estate which included buildings, and where the lessee has agreed to deliver possession of the same at the expiration of the lease in the same condition as at the date of the lease, natural wear and tear excepted. This obligation is subject to the implied condition that the building shall be in existence at the end of the term, and if before that time it was burned down without the default of the tenant, he is held not liable under his contract. (*Warner v. Hitchins*, 5 Barb. 666, Genl. Term; *McIntosh v. Lown*, 49 id. 550 at 555; 1 Wood's Land. & Ten. [2d ed.] 811, 813, notes; 1 Taylor Land. & Ten. [8th ed.] § 360, latter part of section.)

It is otherwise if the lessee has covenanted to repair or rebuild. (*McIntosh v. Lown*, *supra*; *Phillips v. Stevens*, 16 Mass. 238.)

It seems to me as if authorities are not required upon the

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proposition that in a contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made, for, to again quote the language used by Mr. Justice BLACKBURN in *Taylor v. Caldwell* (*supra*): "In the course of affairs men in making such contracts in general would, if it were brought to their minds, say that such should be the condition." There is nothing in the other portions of the charter party which affects in any way to the detriment of the defendant this particular question. If there had been no provision for insurance, and the vessel had been destroyed by fire before the 17th of October, 1885, and without the fault of McKay, it seems to me plain that neither he nor his surety, the defendant here, would be liable on the promise to deliver the vessel in the harbor of New York. The provision for insurance was complied with by McKay, and hence no liability attaches by reason of it.

We are thus brought to the consideration of the question of waiver, or of the extension of the time for the fulfillment of the promise of McKay to deliver the vessel. It was not destroyed before the 17th of October, 1885, the time when McKay was bound by his promise to deliver it to the owners in New York harbor, and McKay failed to make such delivery, and consequently, if that failure be not excused, there was a breach of his agreement, and the subsequent destruction of the vessel without his fault would furnish no excuse for such breach. The defendant claims that this obligation to deliver by October 17, 1885, was waived by the action of the officers of the steamboat company. From the findings and additional findings of the referee and the evidence which has been returned, it seems that, some time before the specified date and while the vessel was in southern waters, negotiations were in progress, through McKay's agent or broker in New York, with the officers of the company for the purchase of the vessel by McKay, who wanted to continue to use it in the Florida trade, and that during these negotiations the time for the delivery in New York passed. Subsequent to that time the terms of sale were substantially agreed upon, the vessel being

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still to the knowledge of the company in southern waters. On the twenty-eighth of October, one of the officers of the company sent to McKay, who was then at Tampa in Florida, a mortgage upon the vessel to be executed by him as a security for the payment of the purchase money, and to be returned to the company after it was executed. The negotiations finally fell through and were abandoned, and in the last of December or first part of January, McKay sent the vessel north to be delivered, and on its voyage it was totally destroyed by fire.

The question arises whether, under all the facts in this case, there was a waiver of a punctual delivery of the vessel in the harbor of New York on the 17th of October, 1885, pending the negotiations for a sale, and if so, whether there was not an extension of time for such delivery until McKay had a reasonable opportunity to make it after the negotiations for a sale fell through. If there were such waiver and extension of time, a destruction of the vessel in the meantime, without the fault of McKay, would be a destruction before any breach of the contract on his part had occurred, and in such case he would not be liable. (See also *Lindsley v. Gordon*, 1 Shepley [13 Maine], 60.)

I have not felt it necessary to mention all the facts which might be urged as material upon the question of whether there were such waiver or not. I think the referee has come very near to a finding that there was. He has found a number of facts upon this question, and in his conclusion of law he said that the company, prior to October 17, 1885, in no manner waived the return of said steamer by McKay to New York on October 17, 1885, other than by the delay occasioned by the negotiations for the purchase of the vessel by McKay, in which the company, McKay and the defendant participated in their efforts to perfect such sale.

The fact of waiver is not here squarely found; it is left somewhat in obscurity. The language seemingly indicates that the referee thought there was a waiver occasioned by the delay in the negotiations for a purchase of the vessel, but that such waiver was not material because the defendant, although

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a surety, was a party to the cause which occasioned the delay and an efficient actor in it with the others. This might be a full answer to a defense based upon defendant's character of surety, where he sought to avail himself of the fact of granting delay to his principal as operating to his discharge as surety. This is not the nature of the defense.

If the delivery of the vessel on the 17th of October, 1885, had been waived by reason of these negotiations for its sale and the time thereby impliedly extended until a reasonable time after their failure in which to make delivery in New York harbor, and if, during such extended time, the loss occurred by fire without the default of McKay, such loss would in that event occur before breach of the agreement to deliver, and the liability of McKay would not attach, and defendant would not be liable as his surety. The fact that defendant participated in the negotiations and thus was a party to the delay would not be material in this aspect of the case.

Although as I have said the finding of the referee as to the waiver may be somewhat obscure, yet if there be any obscurity it is fair to adopt that construction which on its face seems the most natural. It would appear from the language used by the referee that he thought the facts were such as to amount to a delay granted McKay in which to deliver the vessel, but as the delay was consented to if not brought about by the defendant himself, the delay constituted no defense. The case was not decided upon a correct basis as to the original liability of McKay on his contract to redeliver. That liability was assumed to be greater than I think it was, and the effect of the waiver as a defense, if it existed at all, was misapprehended and misapplied. It seems proper to grant a new trial for that reason.

Upon the new trial all the facts may be put in evidence regarding this question of waiver or extension of time and with reference to its proper effect upon the question of defendant's liability, separated from and regardless of the question of his assent to the delay already spoken of.

This is the result to be declared unless the fact that defend-

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ant procured \$17,000 of insurance on the vessel prior to her being sent north is to have an effect sufficient to maintain the judgment. The referee finds that the defendant caused the vessel to be insured against loss by fire for the sum of \$17,000, and it was at the time of its destruction insured in favor of the defendant for that sum and the defendant collected the insurance moneys and kept and retained the same for his own use and benefit and still keeps and retains the same. It does not appear from this finding that defendant insured the vessel for the benefit of the owners. On the contrary the finding is that he insured it for his own benefit, and, inferentially, on account of some interest which he had or thought he had in it. One of the witnesses for the plaintiff testified to the fact that defendant said he had insured the vessel for whom it might concern for \$17,000. The referee alludes in his opinion to the testimony of the defendant as to why he procured the insurance, but it nowhere appears that he effected it in any degree for the company. Another trial may develop the facts more in detail and the question for whom the insurance was obtained may be carefully investigated and its decision may have a most material effect upon the question of the understanding of the defendant as to the effect of the acts which are now claimed to constitute a waiver of delivery of the vessel. And if the insurance were made for the benefit of the owners, or for whom it might concern, or to indemnify the defendant for any liability of his by reason of the signing of his surety contract, it may be that the plaintiff would have an action to recover from the defendant the amount of the insurance as for money had and received by the defendant to his use, or the complaint might be amended by the insertion of proper allegations for the trial of that issue under these pleadings. The whole facts would then appear and the question might then be decided intelligently.

It may be that the defendant has collected moneys from the insurance company which in equity and good conscience he ought to pay to the plaintiff. We cannot say how this is upon the facts as now presented. It is safe to say that if it

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be so and it shall so appear, he will be cast in judgment for the amount he has thus received.

The referee did not base any liability of the defendant upon the fact that he had procured this insurance for \$17,000 upon the vessel. There is nothing in his finding of facts which would sustain such theory and the opinion delivered by the learned referee entirely disposes of any such ground. What if any liability does exist by reason of this insurance procured by defendant can more fully appear in another trial.

No question arises in this record as to where lies the burden of proof as to the loss of the vessel and its cause. The case was tried and decided upon a different theory and without reference to the question of burden of proof. It is not therefore necessary to now discuss it.

For the reasons already given the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

JOSEPHINE VANDEWATER, as Administratrix, etc., Respondent,
v. THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
Appellant.

185	583
166	284

In the absence of a statute imposing upon a railroad company the duty of ringing bells or blowing whistles upon locomotives approaching a crossing, the failure to give such signals is not, as matter of law, negligence. The provision of the General Railroad Act (§ 39, chap. 140, Laws of 1850; § 7, chap. 282, Laws of 1854), imposing that duty, having been repealed by the act of 1886 (Chap. 593, Laws of 1886); the only statute upon the subject remaining is the provision of the Penal Code (§ 421), which provides that the engineer of a locomotive who fails to ring the bell or sound the whistle upon it, eighty yards from a crossing, shall be guilty of a misdemeanor; this imposes no duty upon the company. (MAYNARD, J., dissenting as to last proposition.)

It seems, however, a railroad company owes a duty to the public to run its trains with care and caution at crossings, and the failure to give due warning of an approaching train by the signals specified or in some other way, may properly be considered as bearing upon the question of negligence.

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In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, who, while crossing defendant's tracks at a farm crossing, was struck and killed by a locomotive moving at a very high rate of speed, plaintiff gave evidence tending to show that no bell was rung or whistle blown for a highway crossing two thousand feet from the farm crossing, or when the engine passed a depot sixteen hundred feet therefrom, and that it was the custom of enginemen or firemen to give either one or other of these signals at both those places. The court charged that it was the duty of defendant to blow the whistle or sound the bell eighty rods before reaching the highway and continue it at intervals until the crossing was passed, and that if it did not do this and the accident at the farm crossing was occasioned by that omission, the jury might find a verdict of negligence, the same as if said provisions of the railroad act had not been repealed. *Held*, error. *Vandewater v. N. Y. & N. E. R. R. Co.* (63 Hun, 186), reversed.

(Argued October 10, 1892; decided November 29, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 8, 1892, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This was an action to recover damages for the negligent killing of William P. Vandewater, plaintiff's intestate, while attempting to drive across the track of defendant, a railroad corporation.

The facts, so far as material, are stated in the opinion.

Walter C. Anthony for appellant. The learned justice erred in charging the jury that the provision of the Penal Code (§ 421) which makes it a misdemeanor for any person acting as engineer on a locomotive to fail to ring the bell, or sound the whistle when approaching a highway crossing had the same effect, so far as the railway company is concerned, as the former statute (Laws 1854, Chap. 282, § 7). (*Harty v. C. R. R. Co.*, 42 N. Y. 468; *Cordell v. N. Y. C. R. R. Co.*, 64 id. 535; *Byrne v. N. Y. C. R. R. Co.*, 94 id. 12.) The charge of the learned justice that it was the duty of the engineer to stop his train if he saw, or ought to have seen, the deceased in time to avoid the accident was error. *Chrystal v. T. & B. R. R. Co.* (105 N. Y. 164); *Spooner v. D., L. & W. R. R. Co.* (115 id. 22).

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Charles Morschauser for respondent. The charge of the trial judge to the effect that the defendant was bound to run its train with prudence, and that either if they fail to see from lack of proper prudence when they ought to have seen, and if they did see and failed to stop, if they could, in time to avoid this injury, and if the plaintiff's intestate was free from negligence, it makes the defendant liable, was correct. (*Remer v. L. I. R. R. Co.*, 48 Hun, 352; 113 N. Y. 669; *Swift v. S. I. R. T. R. R. Co.*, 123 id. 648.) The judge's charge was correct in saying: "That if the defendant had neglected to ring the bell or blow the whistle at the approach of the depot and highway crossing, and it was the custom to do so, and if the man was killed by reason of this omission, the defendant was guilty of negligence." (*Chrystal v. T. & B. R. R. Co.*, 124 N. Y. 523.) The court charged in effect that if it didn't sound the bell or blow the whistle, and it was the custom to do it at the village station, and it didn't do that, and the two things combined caused this accident, if the man was killed by reason of the omission to do those things, then I say you may find a verdict of negligence against this company upon it. This was proper. (*Jetter v. N. Y. & H. R. Co.*, 2 Abb. Ct. App. Dec. 458.) The judge's charge was correct in stating that it was a crime for an engineer to fail to blow a whistle or ring a bell at the approach of a highway crossing. (Penal Code, § 421.)

PECKHAM, J. The plaintiff's intestate was killed at a farm crossing over the defendant's railroad, near the village of Fishkill. He was in the act of driving across the track when he was struck and instantly killed by one of the engines of the defendant, which was drawing its pay car. The general direction of defendant's road at this point is east and west. The engine attached to the pay car was coming from the east at the rate of forty or forty-five miles an hour, and at that speed passed a highway crossing called Van Wyck's, and then at a distance of a few hundred yards to the west of that crossing it passed the Fishkill depot, and continuing its very high speed

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passed along still towards the west about sixteen hundred feet, when it reached the farm crossing in question and where the engine came in collision with the horse and wagon belonging to the plaintiff's intestate and threw him out of the wagon and killed him instantly.

The plaintiff upon the trial gave evidence tending to show that no whistle was blown or bell sounded for the crossing of the highway east of the Fishkill depot or for the depot itself, and none for the farm crossing where the accident occurred. This highway crossing was somewhere in the neighborhood of two thousand feet east of the farm crossing. Evidence was also given tending to show that it was customary for the engineers or firemen of the engines to blow the whistle or ring the bell when approaching the highway crossing and also when coming to the depot of the defendant. The learned judge charged the jury that the company were bound to blow the whistle or sound the bell eighty rods before getting to the highway, and continue it at intervals until the crossing was passed. He also said the deceased had a right to assume the company would do its duty with respect to the highway crossing, and if it did not sound the bell or blow the whistle at this crossing and the accident at the farm crossing was occasioned by that omission, then the jury might find a verdict of negligence against the company.

Proper exceptions to this charge were taken by counsel for defendant, who called the attention of the court to the fact that the statute imposing upon the company the duty of having the bell rung had been repealed. The court replied that it was in the Penal Code. Defendant's counsel said that the Penal Code did not apply in a civil action. The court then stated to the jury that it was just the same as if it were written in the law; that it was made a crime instead of imposing a liability for damages, and that the jury might find a verdict just the same as they could before the repeal. To this direction the counsel for defendant took appropriate exception. The question of the omission to whistle or ring on approaching a highway crossing two thousand feet east of the farm crossing

at which the plaintiff's intestate was killed, was thus made a most important factor in the case.

The effect of this charge was to permit the jury to find negligence from the mere omission to ring a bell or sound a whistle at the highway crossing, and the charge was based upon the assumption that the statute made it the duty of the company to make these signals at such crossing. In this we think the learned judge erred.

The statute imposing any duty upon the company to cause a bell to be rung or a whistle sounded upon approaching a highway crossing has been in terms repealed and the provision in the Penal Code does not leave the law the same as it was before the repeal. By section 39 of the General Railroad Act (Chap. 140 of the Laws of 1850), provision was made for placing a bell on each locomotive and direction was given that it should be rung as therein stated, or a steam whistle was to be attached to each locomotive and to be sounded instead. Penalties upon the company neglecting were placed, which could be collected by the district attorney, and the company was made liable for all damages sustained by any person by reason of such neglect. By section 7 of chapter 282 of the Laws of 1854, some additions were made to the provisions under the act of 1850, and it was provided that in addition to the penalties imposed upon the company every engineer in charge of an engine, who neglected to obey the statute, was to be subject to a fine and imprisonment in the county jail.

Subsequently the Penal Code was adopted and it went into operation on the 1st of December, 1882. Section 421 provided that the engineer of a locomotive who failed to ring the bell or sound the whistle upon it eighty rods, etc., should be guilty of a misdemeanor. Then the legislature by the act, chap. 593 of the Laws of 1886, repealed in so many words all the provisions in the General Railroad Act of 1850, and of the act of 1854, above cited, which made it the duty of the railroad company to cause the bell to be rung or the whistle to be sounded, or provided any penalties against the company for its neglect. The only statute upon the subject which remained

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at the time of the happening of the accident in question is to be found in section 421 of the Penal Code, already cited.

Whether it was really intended to repeal all the sections of the law by which the duty was imposed upon the railroad company to cause these signals to be given, may perhaps be doubted, but the repeal is in such plain and peremptory language that courts cannot disregard it without a clear violation of a legislative enactment. The duty of giving the signals is placed by the Penal Code upon the engineer, and his failure is made a crime, and in that way the giving of the signals is still provided for. The statute, however, does not impose the duty upon the company, and unless such duty is imposed by statute the failure to give such signals cannot as matter of law be regarded as a neglect of duty. (*Beisiegel v. Railroad Co.*, 40 N. Y. 9; 14 Abb. Pr. [N. S.] 29; *Weber v. Central-Hudson R. R.*, 58 N. Y. 451-459; *Briggs v. R. R.*, 72 id. 26, 30.)

Of course the companies still owe a duty to the public at such crossings, as elsewhere. That duty is to run their trains with care and caution and when they cross such roads it may well be that the failure to give due warning by whistle or bell, or in some other way, would be held under all the circumstances, to be a failure to manage and run their train with proper care and caution, for which they would be liable to a party injured, if otherwise entitled to recover. Even when compelled by statute to make such signals, it is not necessarily a defense in all cases to prove that they were made. The making of the signals is the least the company can do, and in a given case it might not be enough. (*Harty v. Railroad*, 49 N. Y. 468; *Thompson v. Central-Hudson R. R. Co.*, 110 id. 636.)

When the duty to give signals at highway crossings was by statute imposed upon the railroad company, it was held that it did not apply in favor of one who was walking upon the track, but that it was intended for the benefit of those who were traveling the highway. (*Harty v. R. R. Co.*, *supra*.)

It may be that evidence of the omission to give any signals

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for the highway crossing would not be admissible as bearing upon the question of defendant's negligence in running its trains at the farm crossing two thousand feet distant.

There are cases where evidence has been admitted showing the absence of customary signals at the places where usually they had been given, for the purpose of proving negligence on the part of the company. Whether this was a case where evidence of this nature should be admitted in favor of this plaintiff and with regard to the highway crossing, is a question not now necessary to decide.

If the defendant were guilty of negligence in the manner of running its train over the farm crossing it would be liable to a plaintiff otherwise entitled to recover. Upon a new trial all the facts can be shown which would enable the court or the jury to determine the question.

The judgment should be reversed and a new trial granted, costs to abide the event.

MAYNARD, J., dissents from that part of the prevailing opinion which holds that the duty of the engineer to give a signal when approaching a highway crossing is not the duty of the company, whose agent he is in running the engine, but concurs in the result upon the ground that as matter of law it is not negligence in passing a farm crossing to omit to give the required signal at the highway crossing two thousand feet away. It was a circumstance which the jury might consider in determining the degree of care to be exercised by the defendant in approaching the farm crossing.

All concur, except MAYNARD, J., who concurs in result.

Judgment reversed.

Statement of case.

AUGUSTUS F. HOLLY, as Executor, etc., Appellant, v. CAUFMAN
HIRSCH, Respondent.

In an action for the specific performance of a contract for the purchase of real estate, the question is simply whether the legal title to the land is, notwithstanding the objections made thereto, good in the vendor, and will pass by his conveyance to the purchaser.

The distinction between such a case and one where a purchase at a judicial sale is sought to be enforced, pointed out.

It seems, however, that when the title depends upon questions of fact and resort must be had to parol evidence, a purchaser will not be compelled to perform his contract.

By his will B. gave all his property to his executors, in trust, to receive the rents, etc., to sell, convey or otherwise dispose of it as they might deem best, and finally "to apply the said estate, * * * together with the proceeds of any part or portions sold," as thereafter provided. The testator then gave to each of his said executors two-sevenths of his estate in fee, and the remaining three-sevenths they were to hold upon trust for certain beneficiaries named. B. had contracted to sell a portion of his real estate to P. Before the time fixed for the delivery of the deed B. died. His executors executed a deed to P. and received from him the purchase money unpaid. P. subsequently conveyed to D., who conveyed to plaintiff's testator. In an action for a specific performance of a contract by defendant to purchase said premises, he objected to the title on the ground that the executors had no power to convey in performance of their testator's contract, and so their deed vested no title in P. *Held*, untenable; that while the executors did not take any legal estate under the preliminary devise in trust of all the testator's property; the trust being an active one and enforceable as a power in trust, included every disposable interest, and gave to the executors power to convey a perfect legal title to the real estate in question, irrespective of the fact that the testator had by his contract to sell the same changed in equity the character of his estate therein. *Roome v. Philips* (27 N. Y. 357); *Lewis v. Smith* (9 id. 502), distinguished and limited.

Holly v. Hirsch (63 Hun, 241), reversed.

(Argued October 10, 1892; decided November 29, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 18, 1892, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

135	590
149	21
135	590
154	806
154	812
135	590
157	212
135	590
160	162

Statement of case.

This action was brought to enforce the specific performance by the defendant of his agreement to purchase certain real estate, situated in New York city.

The property was sold by the plaintiff at public auction and struck off to defendant, on his bid; but he refused to complete his purchase, upon the ground that a conveyance by the plaintiff would not pass the legal title.

In 1879 Martin W. Brett was the owner of the premises in question and entered into a contract with one Pinkney for their sale to him. Subsequently, and before the date fixed for the delivery of a deed to Pinkney according to the contract, Brett died; leaving a will, made at a time prior to the making of the contract. In and by the will he appointed two daughters executrices and gave and devised to them all his real and personal property in trust to apply the same to certain uses specified: namely, "to collect and receive the rents, issues and profits thereof and to sell and convey, or otherwise dispose of the said property, or any part thereof, which they are hereby empowered to do at public or private sale, at such time or times, and on such terms and conditions, as they shall deem most for the benefit of my estate and to execute and deliver to the purchaser or purchasers good and sufficient conveyances for the same and to receive the proceeds thereof and to invest the same and to apply the said estate and property and the rents, issues and profits thereof, together with the proceeds of any part or portions sold by them, according to the provisions of this my last will and testament hereinafter contained."

The testator then proceeded to give to each of his daughters, his executrices, two equal seventh parts of his estate in fee and the remaining three seventh parts his executrices were to hold upon trusts; one part for a daughter, one part for the children of a deceased daughter, and one part for the widow and children of a deceased son. Brett's executrices executed to Pinkney a deed of the property, and received from him the balance of the purchase moneys due under his contract with their testator. Pinkney subsequently conveyed to Dempsey, and Dempsey conveyed to plaintiff's testator.

Statement of case.

It is conceded that the only objection to the title consists in the inadequacy of the deed of Brett's executors to vest the legal title to the land in Pinkney and it is upon that ground that the plaintiff's testator is deemed not to have acquired a good title, which his executor might convey to the defendant.

At the Special and General Term judgment went for the defendant, upon the authority of the case of *Roome v. Philips* (27 N. Y. 357).

S. P. Nash for appellant. The objection that the power to convey did not embrace the property in question, because Brett having in his lifetime made the contract with Pinckney, it could not be carried out by his executors, is untenable. (2 R. S. 194, § 196; Code Civ. Pro. §§ 2345, 2346; *People v. Board*, 92 N. Y. 98; *M. L. Ins. Co. v. Wood*, 121 id. 302; *Biden v. James*, 111 id. 680.) The entire title was in the executors, as trustees, and there was no title in the heirs or devisees of Brett. (1 R. S. 729, §§ 56, 60.) As the question involved depends upon a pure point of law, and not upon any doubtful or disputed facts, nor upon any construction of ambiguous writings, the grounds upon which the judges concurred in affirming the judgment below ought not to control the case. (*Irving v. Campbell*, 121 N. Y. 353; *Moore v. Williams*, 115 id. 586; *Haberman v. Baker*, 128 id. 253.)

Samuel Riker for respondent. Specific performance is not a matter of right, but rests in the sound discretion of the court. It will not be granted unless the title be free even from suspicion, or such as the court can conscientiously warrant to the purchaser, neither will the purchaser be forced to take an equitable title. (*Moore v. Williams*, 115 N. Y. 586; 2 R. S. 64, § 45.) When the executors of the vendor demanded of the vendee the payment of the price, they were bound to tender to him a deed from the devisees, conveying to the vendee the legal or naked title. (*Kidd v. Dennison*, 6 Barb. 9; *Watson v. Le Row*, Id. 481; *Thomson v. Smith*,

Opinion of the Court, per GRAY, J.

63 N. Y. 301; *Walton v. Walton*, 7 John Ch. 258; *Adams v. Winne*, 7 Paige, 97.) The power of sale conferred by Mr. Brett on his executors, had become inapplicable to the land in question by the sale of it, which the testator made in his lifetime. (*Roome v. Philips*, 27 N. Y. 357; *Lewis v. Smith*, 9 id. 502; *Alkus v. Goettmann*, 60 Hun, 470; *Jordan v. Poillon*, 77 N. Y. 518; *Flenving v. Burnham*, 100 id. 1, 9, 10, 12; *Abbott v. James*, 111 id. 673, 676, 678.)

GRAY, J. It is quite evident that the learned justices who have passed upon this case felt constrained in the exercise of their judgment by the observations of Judge DENIO, in the early case in this court of *Roome v. Philips* (27 N. Y. 357). I think, however, that a distinction exists between that case and the present one, which is both apparent and substantial. In *Roome v. Philips* the vendor died, leaving a will which simply directed his executors to sell his real estate, and the moneys so to be realized he bequeathed to a mother and an aunt. There was no devise of the realty to, nor any attempt to create an interest in it, in any person, and every interest of testator descended to his heirs at law, liable only to be divested by the execution at any time of the power of sale at the hands of the executor. An administrator, with the will annexed, executed a deed of the land contracted to be sold by testator, claiming the right under the power of sale in the will, and then brought the action to compel the purchaser to perform and to accept the deed; and whether the administrator was clothed with the testamentary power was the question directly before the court. But Judge DENIO, after disposing of the points which the appeal book brought up, proceeded to discuss the question whether, as the vendor had died pending the contract of sale of the land, the power of sale in his will was applicable and conferred capacity upon the donee of the power to convey the legal title to the purchaser. Judge DENIO considered that the power of sale was inapplicable and that the legal title should be conveyed under a deed from the heir, to whom the land had descended, in which the administrator should join. Conceding to the

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opinion of the court in that case all the weight proper for it to have, I think we should limit its operation to the precise state of facts which called for its expression. In that case, as in that of *Lewis v. Smith* (9 N. Y. 502), another case to which reference has been made, there was but the mere naked power of sale in the executors. They were given no right to, or any interest in, the testator's estate.

The plan of this will, upon a careful consideration of its provisions, becomes clear and the difficulty is rather in the inartificial manner in which it is written out. Briefly resumed, the testator first gives all of his property to his executors upon a trust to receive the rents, issues and profits thereof, to sell, convey, or otherwise dispose of it as they may deem best, and "finally, to apply the said estate, together with the proceeds of any part or portions sold, according to the provisions of this will, etc." Then follows a clause giving to two daughters his household furniture, a clause giving to the same two daughters, who were also his executrices, "each two-seventh parts of all my said estate and property to have, etc., forever," and then clauses wherein he "gives, devises and bequeaths unto his said executrices" equal seventh parts of his estate as trustees for persons named, etc.

Now I think it questionable whether the first provision of this will operated to create a valid trust under section 55 of the article on uses and trusts. A devise in trust to receive rents, issues and profits, where there is no direction to apply to the use of any person for any period, and a power to sell property, which is not authorized for the benefit of creditors, or of legatees, or to satisfy a charge upon the same, cannot be deemed to be among the express trusts enumerated in the section. (*Downing v. Marshall*, 23 N. Y. 366, 377; *Cooke v. Platt*, 98 id. 36; *Henderson v. Henderson*, 113 id. 1.)

But I do not consider it essential that there should have been a valid express trust created by this first provision of testator's will. If the trust created is not for purposes enumerated in the section on express trusts, it will be valid as a power in trust; for it authorizes the performance of acts which may

Opinion of the Court, per GRAY, J.

be lawfully performed under a power. Those acts comprehend a management of the estate, the collection of revenues, a sale of all or of portions of it, and a division into seven parts for distribution. The will provides what shall be the distribution of the parts, and makes, in certain instances, absolute gifts, or, in others, valid express trusts.

The cardinal rule in the construction of wills, that the intention of the testator shall prevail, applies when the construction relates to the powers conferred upon executors. The design of the testator is to be regarded and a substantial execution of the power allowed. (3 Johns. Ch. 1; 7 id. 32.)

I regard the intention of Brett, as deduced from his will, to authorize his executors to take his whole property into their custody and management for the purpose of partitioning into the parts, which he gives to the members of his family. The possession of the legal title, however convenient, was not necessary to the end in view. A power was adequate for the accomplishment of all that was designed. As a power in trust, then, was the scope of its operation limited, for the purpose of a conveyance of a legal title to lands, to such lands as remained absolutely the testator's at the time of his death; that is to say, as to which he continued to hold every legal and equitable interest; or does its scope comprehend a disposition of every interest which the testator might have retained and made if living? An argument is made, in that respect, upon the basis of Judge DENIO's remarks in *Roome v. Philips*; but their effect will not be extended to a case where the facts are not the same, and I think we are bound to hold that here the trust, operative as a power, subjected every possible legal interest, which remained in the testator and descended to his heirs at law or devisees, to its operation and execution. Doubtless, it is well settled that the effect of a contract for the sale and purchase of lands is to make of the vendor a trustee for the purchaser, and the purchaser becomes a trustee of the purchase-money, or the unpaid portion of it, for the vendor. That arises from the operation of a purely equitable principle, which contemplates things agreed to be done as actually per-

Opinion of the Court, per GRAY, J.

formed. But, until the delivery of the deed to the purchaser, the legal title to the land has not passed. The beneficial, or equitable, interest is in the vendee by virtue of the agreement of sale, but the legal title is still outstanding. The interest of the vendee is treated as real estate, and that of the vendor as personal property. (1 Sugden Vendors [8th ed.], 270, 273; 3 Johns. Ch. 312, 316; 6 id. 402, 405.)

I do not perceive, however, that the operation of the equitable principle affects the question of the capacity of Brett's executors to act under the trust power by conveying the legal title to the lands to their testator's vendee. Section 59 of the article on Uses and Trusts provides that when the trust is valid as a power the lands shall descend to the persons entitled, subject to the execution of the trust. To give effect to this section, we should hold it equally as operative upon the legal title, which has descended to heirs or devisees, as where they have become vested with both the legal and the equitable title.

The executors of Brett had an interest in the execution of the power; for they were not only to sell, but they were to arrange for a division of testator's property into parts; applying it, and its revenues and profits, to testamentary objects, in which they were concerned as trustees for others, as well as in their individual capacities.

Judge KENT, in *Bergen v. Bennett* (1 Caine's Cases in Error, 1-15), speaking of a power coupled with an interest, remarked that "it is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest in question."

Brett's executors did not take any legal estate under this preliminary devise in trust to them of all of testator's property; but the trust, being an active one and enforceable as a power in trust, comprehended and subjected to its execution every disposable or realizable interest in the testator's estate. The power in trust had all the character of a trust, and being designed for the purpose of effectuating a trust, it was imperative. (2 Sugden Powers, *158; 1 Perry Trusts, 248.)

Opinion of the Court, per GRAY, J.

Its execution through the executors' deed to Pinkney, whereby the balance of the purchase-moneys for the land was obtained for the benefit and application of the estate, was as important a part of the trust confided to them as though the execution related to unsold lands of testator. That the legal and equitable estate had become separated in vendor and purchaser was a matter which affected the nature of the property and not the trust in the executors, or their power to effectively convey whatever legal estate remained in the testator's devisees. I think it must be apparent that the power to Brett's executors, in the present case, was essentially other than was the power given in *Roome v. Philips*, where it was quite unconnected with any interest or trust in the executor.

It is conceivable that a naked power of sale, where the donee has no interest in its execution, might be deemed applicable only to real estate not previously disposed of under the testator's agreement. But the difference is wide between such a case and the present, where the power is one in the execution of which the executors had an interest; as being vested, in part, with the legal title to the testator's property as trustees of express trusts, and as being individually vested with the title to undivided shares. Either way, they had an interest in the execution of this power to manage and to sell for purposes of partition according to the directions of the will.

The conclusion I have reached is that Judge DENIO's opinion, in *Roome v. Philips*, does not control the disposition of this case and that the power conferred upon Brett's executors, being in trust to effectuate the testamentary purpose of a division and partition of the testator's whole property, gave them capacity to convey a perfect legal title to real estate, irrespective of the fact that testator may have agreed for its sale and had thus changed, in equity, the character of his estate therein by the contract.

It was suggested below, and it is argued for the respondent now, that the title is not free from reasonable doubt, because of the legal question raised, and, hence, the courts

Opinion of the Court, per GRAY, J.

should not compel the purchaser to take the title. It must be observed, however, that this land was not bought at a judicial sale. Where a title is objected to which comes through a judicial sale, the court will often exercise its discretion in favor of a purchaser and relieve him from going on with his agreement, if there are questions which might reasonably be raised affecting the title. But where the transaction is one between parties the question is, simply, whether the legal title to the land, notwithstanding the objections made, is good in the vendor and will pass by his conveyance to the purchaser. (*Haberman v. Baker*, 128 N. Y. 253.)

If resort must be had to parol evidence; if it depends upon questions of fact, than a purchaser should, and will, not be compelled to perform his contract. (*Irving v. Campbell*, 121 N. Y. 353.)

In this case there is no dispute as to the facts, and the soundness of the title offered depends upon the decision of the question discussed and which is purely one of law. That question is set at rest by the decision of the court that there is no doubt cast upon plaintiff's title, and the rule *stare decisis* is an effectual bar to the question being again opened.

I advise that the judgment below should be reversed and, as a new trial will be unnecessary, that judgment of specific performance should be ordered against the defendant, with costs to the plaintiff in all the courts.

All concur.

Judgment reversed.

Statement of case.

HENRY M. PEYSER et al., Appellants, v. MATTHEW R. MYERS
et al., Respondents.

135	599
145	294
135	599
d163	280

An incoming partner is not as of course liable for the prior debts or transactions of the firm; he can be made liable only by an agreement on his part to assume such liability. His becoming a member of the firm creates no presumption of the existence of such an agreement.

It is not necessary, however, to prove an express agreement; it may be established by evidence of facts and circumstances which justly raise an implication of its existence.

The priority of lien of firm creditors cannot be affected by a transfer by an insolvent firm of assets to one or more of the partners, or by the withdrawal of one partner from the firm or the introduction of a new member.

In an action brought by judgment creditors to set aside an assignment made by the firm of H. H. & Co. for the benefit of creditors as fraudulent and void, and to procure the application of moneys paid to certain defendants, in pursuance of a preference therein, to the satisfaction of plaintiffs' judgment, it appeared that prior to February 1, 1892, the then existing firm of H. H. & Co. owed the estate of M. a debt upon which it was paying interest. The firm was then insolvent. On that date a new firm was formed with the same name, one B. becoming a partner. The latter knew of the existence of the debt, but not the amount thereof, and he made no inquiry; he contributed no capital, and the new firm had none except the stock and assets of the old firm, and the business was conducted after he became a member precisely as before. The debt to the estate was credited to the executors on the books of the new firm; they were subsequently credited with interest accruing, charged with goods and money paid, and statements of the account were rendered to them. M. testified that his intention, when he went into the firm, was "to take the affairs of the old firm as he found them, and go on with them as a member of the new firm." In 1884 the assignment was executed, B. joining therein, in which the debt to the estate was preferred. He made no defense to an action brought by the executors against him and the other members of the firm to recover the debt as a firm debt, and they obtained judgment therein. Plaintiffs' debts accrued subsequent to B.'s becoming a member of the firm. *Held*, that the stock and property of the old firm at the time B. became a member was subject to the equitable lien of the then existing creditors of the firm; that it was inferable from the circumstances that the new firm had assumed the debt to the estate, and, therefore, had a right to treat it as a debt of the firm, and so, it was properly preferred.

Statement of case.

The assignment directed the payment of and the assignee paid \$102,827 to defendants; in making up the account the interest was compounded. The debt owing to the estate at the time of the assignment with simple interest was \$82,649. The assignors in fixing the amount, the assignee in paying and defendants in receiving it acted in good faith. In a prior action brought by another creditor the court decided the preference to the extent of \$20,228 was invalid, and directed the executors to restore that amount, which was done by them. *Held*, that in the absence of any fraudulent intent, the payment was valid and would be protected, to the extent of the actual debt.

In fixing the actual debt at \$82,649 the interest was computed on the principal to such time as the payments equalled or exceeded the interest, and then by deducting the payments from the aggregate of principal and interest, a new principal was ascertained. *Held*, a proper method of computation.

(Argued October 11, 1892; decided November 29, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1892, which affirmed a judgment dismissing plaintiff's complaint as to certain defendants.

This action was brought by judgment creditors to set aside as fraudulent an assignment for the benefit of creditors, and to procure the application of certain moneys paid to defendants, in pursuance of a preference contained therein, to the satisfaction of plaintiff's judgment.

John J. Adams for appellants. The preferred claim was not due by the firm which assigned. (*Serviss v. McDonnell*, 107 N. Y. 264; *Wheat v. Rice*, 97 id. 296; *S. N. Bank v. Burt*, 93 id. 245; Lind. on Part. 206.) Bentley, the incoming partner, did not agree to assume the liability of the old firm. (Lind. on Part. 209; *Merrill v. Green*, 55 N. Y. 273; *Simson v. Brown*, 68 id. 358.) There was not an implied agreement on the part of Bentley. (*Fuller v. Rowe*, 59 Barb. 54; *Chambers v. Smith*, 60 Hun, 250; *C. C. S. Bank v. Walker*, 66 N. Y. 429.) The old firm's insolvency prevented the new firm from assuming liability for its debts, it, too, being insolvent. (*C. W. Co. v. Hoderpyl*, 61 Hun, 563; *Nordlinger v. Anderson*, 123 N. Y. 548; *Bulger v. Rosa*, 119 id. 466;

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C. Bank v. Williams, 128 id. 82; *Wilson v. Robertson*, 21 id. 591; *Young v. Hill*, 67 id. 167; *Boardman v. M. S. & L. S. R. Co.*, 87 id. 187; *Ackerman v. Emmett*, 4 Barb. 649; *Foreman v. Foreman*, 17 How. Pr. 257; *Stewart v. Petree*, 55 N. Y. 623; *Guernsey v. Rexford*, 63 id. 631.) The admission, on the trial of this action, that \$20,000 of the preference to the Myers estate was fictitious, affects the defendants' title to the fund as a whole. (*Peyser v. Myers*, 56 Hun, 180; *A. E. Bank v. Webb*, 36 Barb. 291; *Roberts v. Victor*, 130 N. Y. 585; *Loos v. Wilkinson*, 110 id. 209; *Billings v. Russell*, 101 id. 226; *People v. Chalmers*, 60 id. 159; *Coope v. Bowles*, 28 How. Pr. 10; *Riggs v. Murray*, 2 Johns. Ch. 565.)

William Pierpont Williams for respondents. Bentley, who became a partner in the firm on February 1, 1882, was liable with his copartners for the debt due the Meyers estate. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Griswold v. Haven*, 25 id. 595; *Arnold v. Nichols*, 64 id. 117; *Hannigan v. Morrissey*, 37 N. Y. S. R. 138.) The respondents are entitled to retain all the preference money except so much of it as represented compound interest. (*Simons v. Goldbach*, 56 Hun, 204; *Russell v. Winne*, 37 N. Y. 591; *F. N. Bank v. C. N. Bank*, 124 id. 552; *Bump on Fraud. Cons.* [3d ed.] 486; *Sanford v. Wheeler*, 13 Conn. 165; *Ayres v. Husted*, 15 id. 504; *Felton v. Wadsworth*, 61 Mass. 587.) The amount of compound interest included in the preference was only \$20,223. (*State v. Jackson*, 1 J. C. 13; *Young v. Hill*, 77 N. Y. 167; *French v. Kennedy*, 7 Barb. 452; *Williams v. Houghtailing*, 3 Cow. 86; *Bennett v. Cook*, 2 Hun, 527, 529; *A. C. & I. Co. v. Verner*, 22 Ohio St. 373; *Stoughton v. Lynch*, 2 J. C. 210, 214; *Von Hemert v. Porter*, 11 Metc. 210, 219.)

ANDREWS, J. It will be convenient to consider the validity of the preference to the estate of John K. Myers for the sum of \$102,872, made in the assignment of the firm of Halsted, Haines & Co., dated July 12, 1884, irrespective of the claim

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that the preference exceeded the amount of the debt owing to that estate. The parties assailing the preference are creditors of the firm, whose debts arose subsequent to February 1, 1882, the date on which Bentley became a member. The debt to the Myers estate preferred in the assignment, existed at the time of the admission of Bentley as a partner, except as it was increased by interest accruing thereafter. If the debt had not become the debt of the assigning firm, and there was no equitable right to prefer it in the assignment, the preference was void, because in that case it would be in contravention of the rule which forbids an insolvent firm from appropriating its property to the payment of other than debts of the firm, or debts for which the members of the firm were jointly liable, to the prejudice of the firm creditors. (*Wilson v. Robertson*, 21 N. Y. 587; *Citizens' Bank v. Williams*, 128 id. 77.)

It is indisputable that an incoming partner is not as, of course, liable for the debts or transactions of the firm, and that he can be made liable in an action at law by the creditor only by some agreement on his part to assume such liability. The mere fact that he becomes a member of the firm creates no presumption of the existence of such agreement. The fact, however, may be established by indirect as well as by direct evidence, and may, in the absence of an express agreement, be inferred from facts and circumstances which justly raise an implication of its existence. (*Serviss v. McDonnell*, 107 N. Y. 264; *Hannigan v. Morrissey*, 37 N. Y. St. Rep. 138; *Lind. on Part.* p. 208.) The facts in the record justify the conclusion that Bentley came into the firm upon the tacit understanding that there was to be no break in the business, and the debt to the Myers estate was to be treated as the debt of the new firm.

The stock and assets of the prior firm went into the possession and ownership of the new firm. There was no inventory, and the business was conducted, after Bentley became a member of the firm, in precisely the same manner as before. Bentley had been a salesman of the preceding firm of the same name for several years. He brought no capital into the firm.

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and the firm had no capital except that which was represented by the stock and assets derived from the prior firm. The debt to the Myers estate was credited to the estate on the books of the firm of 1882, and was credited with interest and debited with items for goods and money had by the executors from the firm up to the time of the assignment. On the 1st of January in the years 1883 and 1884, and again on the 11th of January, 1884, the new firm of Halsted, Haines & Co. rendered statements of account to the executors of Myers, showing credits and debits and the net balance due to the estate. It seems that Bentley, when he became a partner, did not examine into, nor did he know, the financial condition of the firm. He had nothing to do with the books, and while he knew that the firm was using money of the estate of Myers, he did not know the amount and made no inquiries. He testified that it was his intention when he went into the firm "to take the affairs of the old firm as he found them, and go on with them as a member of the new firm."

While it is doubtless true that Bentley joined the firm in ignorance of its financial condition, it is difficult to resist the inference that it was the understanding of all the partners that the debt of the Myers' estate was to be treated and regarded as a debt of the firm. In 1884 Bentley joined in the execution of the firm assignment, in which the debt was preferred, and afterwards made no defense to an action brought by the estate against himself and the other members to recover the debt as the debt of the firm, in which action judgment was rendered for the plaintiffs. If it was essential to maintain that there was a technical novation of the debt and a substitution of the members of the firm of 1882 as the debtor in exoneration of or in place of the persons originally liable thereon, in order to render the preference valid, the undertaking would encounter serious difficulties. Such a novation could only be effected by the agreement of the original debtors, the new firm and the creditor. It would be difficult to establish from the circumstances disclosed in the record that the creditor agreed to take the new firm as his debtor in place of the former members of

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the firm (one of whom had withdrawn in 1879, and another had died in 1880). So also, if the case depended upon the application of the principle of *Lawrence v. Fox* (20 N. Y. 268), it would be difficult to find the existence of such a promise for the benefit of the estate of Myers made between Bentley and his copartners, as would support an action at law by the executors of that estate against the firm of 1882, to recover the debt. But the doctrine now well settled that in case of the insolvency of a firm the joint property must be first applied to pay the joint debts, has its foundation in the equity that the credit given to the firm is presumed to have been extended upon the faith of the joint liability and on the fact that the property of the firm is in many and, perhaps, in most cases a fund derived in part at least from the creditors who have dealt with the firm in the ordinary course of business. The corpus of the firm property belongs to the firm as an entity, and not to the individual partners, their separate interest being only in the surplus after an adjustment of the partnership debts and accounts, and hence the right of individual creditors is the right of their debtors in such surplus.

This priority of lien of the firm creditors is not divested by a transfer by an insolvent firm of the firm assets to one or more of the partners, nor can it be affected as we conceive by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of a new member. It is found and is undisputed that when Bentley became a member of the firm in 1882, the firm of Halsted, Haines & Co. was insolvent and had been insolvent from 1875, although the fact does not seem to have been known to the firm. The stock and property of the firm prior to and at the time Bentley became a member was subject to the equitable lien of the then existing creditors of the firm, among whom was the estate of Myers. This stock and property was transferred to the firm of which Bentley became a member. It was, as has been said, the understanding between the partners, inferable from the circumstances, that the new firm should assume the Myers debt, and when the open insolvency occurred in 1884,

this debt was preferred as a debt of the insolvent firm. In this we think there was no violation of any legal or equitable right of the intervening firm creditors. The Myers estate had at least an equal equity to payment out of the firm assets. The new firm had the benefit of the stock and property of the prior firm, which presumably formed a large share of its assets at the time of the assignment. We think the new firm had the right to recognize the debt owing to the Myers estate, and to treat it as a debt of the new firm when it came to make the assignment. This right does not depend upon the question of novation, nor upon the right of the executors of the Myers estate to recover at law against the firm of 1882. The firm having, under the law existing in 1884, a right to make a preference among its creditors, it had a right we think to prefer a debt which in the origin of the partnership and concurrently with the transfer of the stock and assets of the prior firm, it had recognized as the debt of the new partnership. The principles set forth in the opinions in the case of *Menagh v. Whitwell* (52 N. Y. 146) confirm and justify the conclusion we have reached.

It is claimed, however, that irrespective of this question the preference was void for the reason that it exceeded the actual and legal debt owing to the Myers estate. The assignment directed the assignee to pay "to the estate of John K. Myers \$102,827," and this sum was paid by the assignee to the executors of the estate of Myers, pursuant to the direction, September 9, 1884, four years before the commencement of the present action. The legal debt owing to the estate of Myers at the time of the assignment was, as is found, only \$82,649. The discrepancy between the debt as stated in the assignment and the legal debt, was occasioned by embracing in the account as written up and rendered from time to time by Halsted, Haines & Co., compound interest; that is to say, the account was made up with annual or semi-annual rests, and the debt as preferred included \$20,223, or thereabouts, of interest arising from this method of computation. It is conceded that computing the interest according to

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the rule laid down in *State of Connecticut v. Jackson* (1 Jo. Ch. 13) and approved in *Young v. Hill* (67 N. Y. 162), the true amount of the debt at the time of the assignment was \$82,649. It is found, and of this there is no contradiction, that the assignors in fixing the amount of the debt, as stated in the assignment, and the assignee in paying that amount and the executors in receiving it, acted in good faith and without any intent to defraud and upon the belief that the amount preferred and paid was the actual sum due and legally owing to the estate. The Supreme Court in a prior action by another creditor decided that the preference to the extent of \$20,223 was invalid, and it adjudged that the estate of Myers should restore that sum, and this sum has been repaid and applied upon the debts represented by the plaintiff in that action. It is now insisted by the plaintiff in this action that the preference having exceeded the actual debt, the assignment was fraudulent and void and that the estate of Myers is bound to restore at the suit of creditors of the firm, not the excess simply, but the whole amount paid and received under the assignment.

It is not necessary to determine whether an action to set aside an assignment for fraud could be supported upon the bare proof that the assignor had overstated the amount of the preferred debt, where it was made to appear that it was a mere mistake in the method of computation or in the amount due, and was not attributable to any fraud. In the present case one creditor is seeking to compel another to pay back money received by the former under the assignment, in good faith, in discharge of an honest debt before any lien had been acquired by the plaintiff on the fund in the hands of the assignee, and the plaintiff bases his claim on the ground that the estate was preferred a larger amount than the actual debt, and that although the parties acted in good faith and the estate has accounted for the excess, it cannot retain the balance, which represents only the actual debt owing by the insolvent firm. The opinion of the Second Division of this court in *Knower v. Central National Bank* (124 N. Y. 552),

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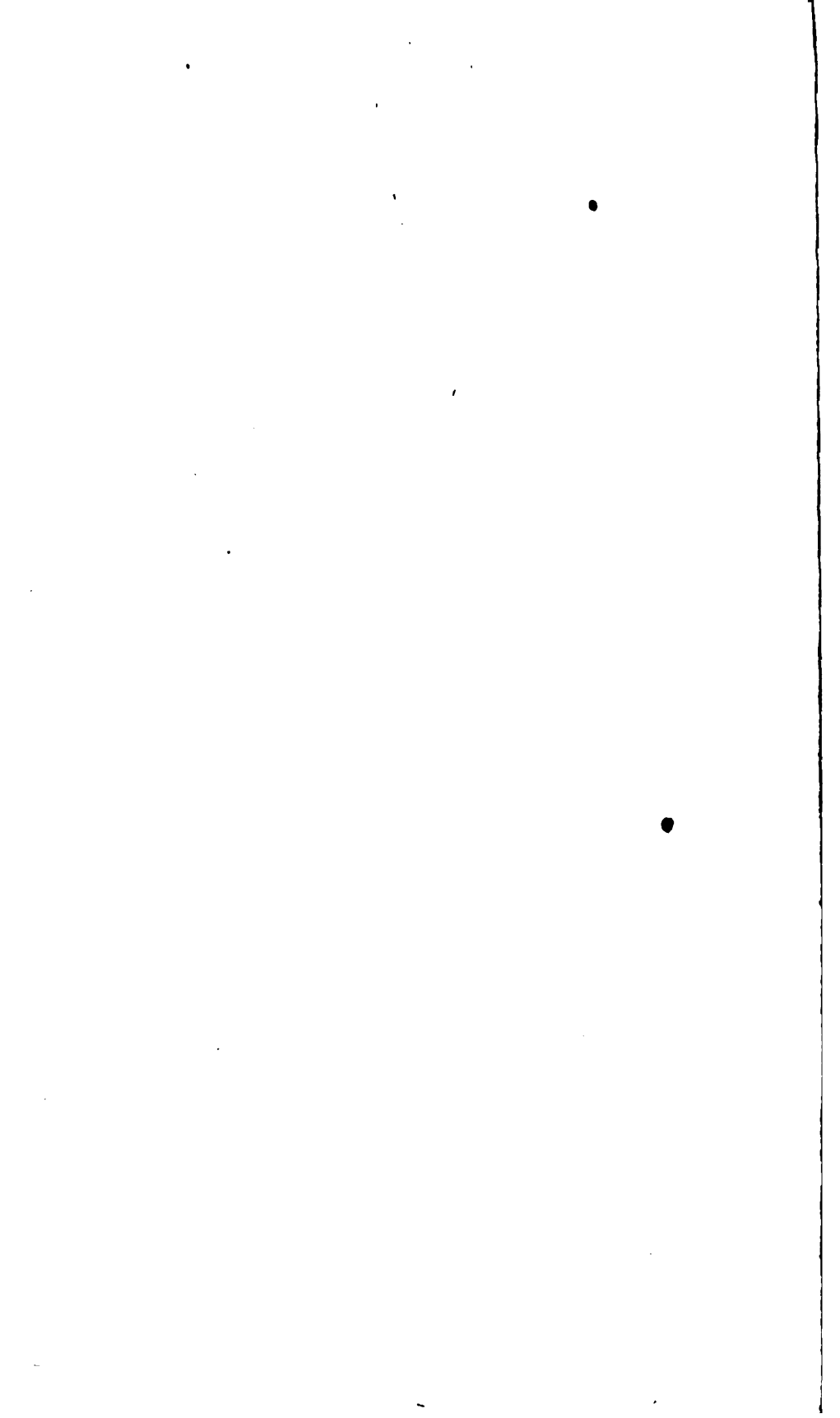
considers with great ability the question of the validity of a payment made by an assignee for the benefit of creditors to a preferred creditor, pursuant to the direction in the assignment, before lien acquired or judgment rendered declaring the assignment void. The opinion in that case is a satisfactory answer to the claim made in this action, and while this case differs in the circumstance that here the preference exceeded the legal debt and the payment was made of the whole amount preferred, this, we think, did not, in the absence of an actual fraudulent intent, prevent the application of the principle of the case cited to protect the payment to the extent of the actual debt.

In fixing the actual debt at \$82,649, the court applied the principle of computation recognized in the cases to which we have referred. The interest was computed on the principal to such time as the payments equalled or exceeded the interest, and then a new principal was ascertained. The method of computation adopted has been long recognized in this state as legal, and we perceive no reason for disregarding it in the present case.

We think there is no error in the record calling for a reversal of the judgment, and it should, therefore, be affirmed.

All concur.

Judgment affirmed.



MEMORANDA

OF

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

EMMA K. ENOS, Respondent, v. JOHN A. ENOS, Appellant.

In an action for slander plaintiff is entitled to prove, as bearing upon the question of malice, other slanderous statements than those set forth in the complaint, made by defendant, imputing the same charge as that embodied in the words set forth.

It is not necessary that such other statements shall be in the same words or substantially the same as those set forth; it is sufficient if they are a repetition of the same calumny.

It seems, however, that words so proved as repetitions of the slander charged are only admissible or available as bearing upon the degree of malice of defendant in speaking the words charged in the complaint; they do not furnish an independent cause of action, and no recovery can be based solely thereon.

Where an action for slander was based upon words charging a married woman with unchastity, *held*, that it was competent for plaintiff, as bearing upon the question of damages, to prove that she had a family of young children.

(Argued May 25, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action for slander.

The complaint alleged that on many occasions during three years preceding the commencement of this action the defendant spoke words, which were particularly set forth, imputing unchastity to plaintiff, and also charging her with theft.

The following is the opinion in full:

"The words proved by the witness Burt imputed a charge of unchastity, and were, we think, admissible under the rule

which permits proof of a repetition by the defendant before the commencement of the action of slander charged in the complaint, as bearing upon the degree of malice which actuated him in speaking the words laid. (*Root v. Lowndes*, 6 Hill, 518; *Howard v. Sexton*, 4 N. Y. 157; *Frazier v. McCloskey*, 60 id. 337.) The words testified to by Burt are not the same words, nor substantially the same words laid in the complaint, but they were of the same import, or at least the jury might so find. They would not, under the rules of pleading, if they had been relied upon to sustain the action, have been provable without an amendment of the complaint, because the words laid must be proved in substance, and different words, although imputing the same charge, but entirely different language will not support the complaint.

"But where the object of proving other words is to show the malicious intent of the defendant in speaking the words laid, then, provided they impute the same and not a different charge, or a charge of a different nature, there seems to be no reason for excluding them in view of the general rule and the purpose for which repetitions are admissible. If the words are a repetition of the same calumny, the particular form of words in which the repetition is clothed would seem to be immaterial. They would equally bear upon the malice of the defendant, as if the repetition was verbally exact, and I perceive no reason why their proof in an action would not bar another action by the plaintiff founded thereon, to the same extent as if the words were identical. (See *Root v. Lowndes*, *supra*.)

"We think the trial judge erred in his charge to the jury in respect to the evidence of Burt. He dwelt at considerable length upon it, and in such terms instructed the jury that if they found that the defendant intended by the words to charge the plaintiff with unchastity, they might base their verdict upon them. The words, as has been said, did not sustain the complaint. They were not the words counted on, nor substantially similar words. They were admissible, as has been stated, as bearing upon the degree of malice of the defendant in speaking the words in the complaint. But the authorities are uniform that words proved as repetitions of the slander

charged are not an independent ground of action in the case, and that no recovery can be had for uttering them. They reflect upon and strengthen the claim for damages on account of the words charged.

"If the defendant had excepted to the part of the charge referred to, or in any other way had raised the question by a proper exception that the jury had no right to regard the words sworn to by Burt as a ground or cause of action, the point would have been well taken. But we do not find that the point was raised.

"After the evidence of Burt had been given, and the defendant's counsel had cross-examined the witness, he asked that the evidence should be stricken out, upon the grounds that the statement proved was not alleged in the complaint, and that it was not a statement alleging unchastity. The court denied the request and exception was taken. Before Burt was examined, words charged in the complaint had been proved in substance, and Burt's testimony was competent as a repetition, and they did amount to a charge of unchastity. The court might properly refuse to strike out the testimony. The only exception to the charge is stated in the case as follows: 'Counsel for the defendant excepted to the charge that the jury might pass upon what the defendant intended by the words sworn to by Burt, and to all that was charged upon the subject.' This manifestly did not call the attention of the court to the error to which we have referred.

"There were some other exceptions taken on the trial. Some were taken to questions asked witnesses as to what was said by the defendant in their presence at a time and place stated, and the objection preceded the giving of the evidence. It is now claimed that the complaint did not allege, with sufficient particularity, time, place and circumstance in connection with the speaking of the words charged, and that no proof thereunder could be given, and the exceptions now referred to were doubtless based upon this view. We think the complaint was sufficiently definite, and if, for any reason, the defendant desired a fuller statement of the circumstances, his remedy was by motion, and he could not exclude the evidence by objection taken on the trial. It was competent to permit proof

that the plaintiff had a family of young children, as bearing upon the question of damages. It certainly was a serious aggravation that the words were spoken of a mother having children who would be disgraced by such a charge. (See Townshend on Slander, § 391, and cases cited.) The rule that the wealth of a defendant cannot be shown in aggravation, is based upon the fact that the circumstance has no relation to the injury suffered by the plaintiff. (See *Myers v. Malcolm*, 6 Hill, 292.)

"We find no exception justifying a reversal of the judgment.

"The judgment should be affirmed."

John Gillette for appellant.

Huson & Dwelle for respondent.

ANDREWS, J., read for affirmance.

All concur.

Judgment affirmed.

ALBERT P. MILLER, Appellant, v. NEW JERSEY STEAMBOAT
COMPANY, Respondent.

(Argued June 3, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 6, 1890, which reversed a judgment in favor of plaintiff, entered upon a verdict and granted a new trial.

Henry L. Brant for appellant.

W. P. Prentice for respondent.

Agree to affirm on opinion of General Term, and for judgment absolute in favor of defendant on stipulation.

All concur.

Order affirmed and judgment accordingly.

THE PEOPLE ex rel. FRANK J. SHERMAN, Respondent, v.
JOHN PERSON et al., Appellants.

(Argued June 7, 1892; decided October 4, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 16, 1892, which reversed an order of Special Term, denying a motion for a writ of peremptory mandamus.

J. S. L'Amoreaux for appellants.

Edgar T. Brackett for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

ALEXANDER SAUNDERS, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

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(Argued June 9, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This was an action of ejectment to recover possession of two parcels of land, part of defendant's roadway, depot and freight yard at Yonkers.

The following is the opinion in full:

"The main questions of law underlying this case have just been decided by us adversely to the defendant in its actions against Aldridge,* and they need no further attention. The plaintiff, therefore, stands before us with a perfect record title, and the defendant without any. The defendant, however, claims that it has two defenses to this action, founded upon the facts. The first defense is that at the time of the grant to

* *N. Y. C. & H. R. R. Co. v. Aldridge* (ante, page 83).

the plaintiff it was in the actual possession of the lands claiming under a title adverse to that of his grantor, and hence that the grant to him was void. (1 R. S. [2d ed.] 732.) The facts do not sustain this defense, and so the trial judge found. There was evidence tending to show that in 1882, when the plaintiff took his deed of the lands, they were not in the actual possession of the defendant. A minute analysis of the evidence now is not needed, and would serve no useful purpose. The finding of the trial judge concludes us.

"The other defense is that of adverse possession. The evidence is abundant to show that the defendant had not been in the adverse possession of any part of the land claimed in this action for twenty years, and so the trial judge found; and even if we had the power we see no reason to disturb his finding.

"The judgment should be affirmed with costs."

Robert F. Wilkinson for appellant.

Ralph E. Prime for respondent.

Calvin Frost for persons not before the court having similar interests with respondent.

EARL, Ch. J., reads for affirmance.

All concur.

Judgment affirmed. _____

MARGARET E. NIEBUHR, Appellant, v. JOHN SCHREYER,
Respondent.

A party desiring to claim that facts offered to be proved are not competent under the pleadings must in some way raise the objection on trial; if he fail to do this he will be deemed to have waived it and to have consented that the evidence should have its legal force and effect.

Where the record on appeal in an action tried by a referee contained none of the evidence, but simply so far as proofs were concerned the referee's findings of fact. *Held*, it was to be assumed that all the evidence upon which the findings were based was received without objection; and that the question as to the competency of the evidence under the pleadings was waived, and so, it could not be considered here.

(Argued June 13, 1892; decided October 4, 1892).

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 6, 1891, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This was an action for an accounting in respect to certain property alleged to be held as partnership property.

The following is the opinion in full:

"The very satisfactory opinion delivered in the General Term leaves but little to be said here.

"This record contains only the findings of the referee, and none of the evidence, and therefore we have only to determine whether the conclusions of law are justified by the findings of fact.

"The record presents no questions as to the pleadings. We cannot know that any objection based on the pleadings was made to any of the evidence and we must assume that all the evidence given upon which the findings of fact were based was received without objection, and hence that it was entitled to be considered and to have effect in the decision of the case. A party desiring to claim that facts offered to be proved are not warranted by the pleadings and the issues made by them, must in some way at the trial object to the proof as incompetent under the pleadings, or else he will be deemed to have waived his objection and to have consented that it should have its legal force and effect.

"There was no mistake in the findings of law as to the proceeds of the premises No. 424 West 40th street. The argument of plaintiff's counsel to charge these proceeds to the defendant is not even plausible, and needs no more attention than it has received in the opinion of the court below.

"The main objection of the plaintiff is to the allowance to the defendant of the sum of \$8,000, which is one-third of the profits realized from the eight houses and lots situate on West Forty-fifth street, and on Fourth avenue. She objects that that sum was a usurious bonus agreed to be paid to the defendant for the loan of money. There is no allegation of usury in the complaint or reply. It does not appear that any objection pointing to usury was made at the trial or in any way brought

to the attention of the referee. There was no finding, and there was no request to find that the one-third of the profits was agreed to be paid in addition to the legal rate of interest for the loan or forbearance of money. The finding of the referee is that the defendant agreed to advance 'such moneys as should be needed to erect such buildings and pay for such lots over and above such as should be raised on bond and mortgage thereon; and, on the sale of the houses and lots should from the purchase price thereof be repaid, all of his advances made with interest thereon, and should be entitled to receive in addition thereto one-third of the profits that should be received on such sale,' and that afterward, for the better assurance and security of the defendant, the plaintiff, by an instrument in writing, 'declared that she held the title to said property (the eight houses and lots) subject to the repayment of the defendant's advances thereon with interest, and the payment of one-third of the net profits arising on the sale thereof, as and when sold and conveyed or otherwise disposed of.' The findings tended to show that the parties were jointly interested in these houses and lots under an agreement by which the defendant was to have the money advanced by him with the interest thereon and one-third of the profits. That agreement was reduced to writing signed by the plaintiff, which, as the referee found, specified the relationship between the parties as to the eight houses and lots. That writing was put in evidence and marked as an exhibit, and yet it does not appear in the case, and we do not know what its precise terms were. We cannot infer that it created the relation of borrower and lender between these parties, or that it provided for usury to be paid by the plaintiff for money loaned to her by the defendant. The inference from the findings is that it made the parties jointly interested in the real estate to the extent and in the manner above specified. The plaintiff had the burden of establishing the usury which she now charges, and if that paper showed the relation of borrower and lender she should either have had additional findings or have printed the writing in the record. There is nothing in this record upon which she can now base the charge of usury which her counsel makes.

"The judgment should be affirmed, with costs."

T. Mitchell Tyng for appellant.

Alex Thain for respondent.

EARL, Ch. J., reads for affirmance.

All concur.

Judgment affirmed. _____

NATHANIEL HOOPER et al., Appellants, *v.* C. McCULLOCH
BEECHER et al., Respondents.

(Argued June 13, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 17, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Franklin Bien for appellants.

F. S. Bangs for respondents.

Agree to affirm on decision on former appeal (118 N. Y. 413).

All concur.

Judgment affirmed. _____

LEONARD A. WOOSTER, Respondent, *v.* THE WESTERN
NEW YORK AND PENNSYLVANIA RAILROAD COMPANY,
Appellants.

(Argued June 14, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

John G. Milburn for appellants.

William L. Marcy for respondent.

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Agree to affirm ; no opinion.

All concur, except EARL, Ch. J., and PECKHAM, J., not voting.

Judgment affirmed. _____

GUISEPPE MIELE, Appellant, v. JOSEPH DEPERINO et al.,
Respondents.

In an action to rescind a contract for the purchase of real estate and to recover \$200 purchase money paid, and \$203.51 expenses of search and disbursements, the complaint also alleged that plaintiff was by the terms of the contract to receive the rent of the premises from June 1st to 15th, and without alleging the amount thereof asked to recover the same. The judgment was for defendant. *Held*, that the amount involved was less than \$500, and so the judgment was not reviewable here; that as plaintiff sought to rescind the contract he could not at the same time claim the rent of the premises he would have been entitled to had he performed it.

(Submitted June 15, 1892; decided October 4, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of December, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The following is the opinion in full :

"On the 14th day of May, 1891, the plaintiff entered into a contract with the defendants to purchase from them certain real estate situated in Brooklyn ; and at the time of the execution of the contract he paid them two hundred dollars to apply upon the purchase price. The deed of the real estate was by the terms of the contract to be delivered to the plaintiff by the defendants on the 1st or the 15th of June at the election of the plaintiff. Subsequently the time for the delivery of the deed was postponed to July 3d, and on that day the defendants tendered a deed of the real estate to the plaintiff, but he refused to accept it claiming that the defendants did not have good title to the real estate. He then demanded repayment of the sum of \$200, and the further sum of \$203.51 for his expenses and disbursements in examining the title to the real estate, and these sums not being paid,

about the 17th day of July, 1891, he commenced this action to recover the amount of them.

"These sums do not amount to \$500, and as the action does not affect the title to real property, or an interest therein, this court has no jurisdiction to entertain this appeal. (Code, § 191.)

"By the terms of the contract the plaintiff was to have the rent of the real estate from the first to the fifteenth day of June, and in his prayer for relief he also asks to recover such sum as may be found due for the rent during that time. He does not allege the amount or the value of the rent, and he sets forth no facts entitling him to recover the rent. He cannot repudiate or rescind the contract which gave him the rent and at the same time have all the benefits of the contract to which he would be entitled if it were performed. No fact is alleged in the complaint showing that the plaintiff is entitled to recover more than the two items mentioned.

"The appeal should therefore be dismissed with costs."

D. W. Northrup for appellant.

Wm. Doll and *Robert H. Racey* for respondents.

EARL, Ch. J., reads for dismissal of appeal.

All concur.

Appeal dismissed.

CHARLES SPENCER, Appellant, *v.* THE STATE OF NEW YORK,
Respondent.

Where a claim has been wholly rejected by the Board of Claims, to sustain an appeal, the right to recover some sum must so conclusively appear as to raise a question of law, or there must have been some material and erroneous ruling adverse to the claimant.

Upon the hearing of a claim for damages to a farm by the overflow of a creek alleged to have been caused by water, which escaped through a defective dam built by the state across said creek, but which the state claimed was caused by freshets, the state was allowed to prove under objection and exception that obstructions created by bridges and railroad embankments below said farm hindered the discharge of the waters of said creek, *Held*, no error; that such evidence was relevant in considering the effect of freshets and their tendency to produce an overflow.

(Argued June 13, 1892; decided October 11, 1892.)

APPEAL from award by the Board of Claims made September 11, 1889, awarding the claimant nothing.

The following is the opinion in full:

"The right of the claimant to damages against the state, occasioned, as alleged, from the overflow of Butternut creek upon his lands in the winter and spring of 1886 and 1887, depended upon a question of fact.

"It was contended on the part of the claimant that the overflow was caused by the discharge into the creek of water from the long level of the Erie canal at a point over Butternut creek, which escaped through a defective dam built by the state across the canal immediately east of the point where the canal passes by an aqueduct over the creek, and was discharged through an opening in the flooring of the aqueduct into the creek below.

"It was contended on the other hand by the state that the overflow was caused by unusual freshets which occurred at intervals during the winter and spring, which surcharged the creek beyond its capacity, whereby the water overflowed its banks and was discharged on the lands of the claimant and other lands in the vicinity, and there remained until April, 1887. This was the issue litigated before the Board of Claims, and the board decided adversely to the claimant on the ground, as stated in their report, 'that the overflow of the farm of the claimant, and the injury and damage sustained by him by reason thereby, were caused by and the result of the heavy rains and freshets aforesaid.'

"The issue involved a question of fact purely, and its determination presents no question of law, unless it appears that there was an absence of all evidence to support the finding above recited, and that evidence was given by the claimant tending to show that the overflow and damages were attributable in whole or in part to the action of the state. There was no substantial controversy on the trial as to the fact that water was discharged during the winter through openings in the aqueduct into Butternut creek above the lands of the claimant. But there is a considerable discrepancy in the evidence as to the quantity so discharged. To the extent of such discharge it of course increased the volume of water flowing in

the creek and presumably added to the overflow, and if the addition from this source produced or contributed to the damage sustained by the claimant, he was entitled to compensation.

"There was evidence from which the board might have found that the overflow and consequent damage were to an appreciable extent caused by the discharge of the water from the canal. It is unnecessary for us to express an opinion upon the weight of evidence upon this point, as we have no jurisdiction to consider it since by the terms of the statute vesting in this court jurisdiction of appeals from awards of the Board of Claims, appeals can be taken 'Upon questions of law only arising upon the hearing of the claim, or upon the excess or insufficiency of such award or order' (Laws of 1887, chap. 507). Where a claim is wholly rejected and no award of any sum is made, the right to recover some sum must conclusively appear in order to raise a question of law, or there must have been some material and erroneous ruling adverse to the claimant, which prejudiced him in the prosecution of his case.

"In opposition to the case made by the claimant there was considerable evidence given in behalf of the state, tending to show that large and almost unprecedented freshets occurred from time to time during the winter, on and after December 1, 1886, which largely increased the volume of water in the creek and caused the overflow; that large tracts of land within the town, not affected by the waters of the creek, were overflowed; that by reason of the lower level of the lands of the claimant and the want of any sufficient outlet, and the detention by ice, the water remained on the land. In short there was evidence tending to show or from which it could be inferred, that the discharge from the canal did not occasion the overflow, and that the whole injury would have been sustained if no water from the canal had been discharged into the creek.

"Under such a state of the evidence we cannot review the finding of the Board of Claims upon the fact litigated.

"The counsel for the claimant refers to several exceptions to evidence. We think it was competent for the state to show the obstructions created by bridges and railroad embankments below the farm of the claimant, hindering the discharge of the

water in the creek. It was relevant in considering the effect of the freshets and their tendency to produce an overflow. The evidence admitted against the objection of the claimant, to the effect that the building of the Jamesville reservoir had impaired the condition of the claimant's lands, and that freshets had been less frequent since the reservoir was constructed, was, we think, incompetent.

"But in view of the ground on which the decision was placed, this evidence could not have affected the result, and was harmless.

"Upon the whole, we see no ground upon which this court can interfere with the award.

"The award should be, therefore, affirmed with costs."

T. E. Hancock for appellant.

S. W. Rosendale, Attorney-General, for respondent.

Per Curium opinion for affirmance.

All concur, except MAYNARD, J., taking no part.

Award affirmed.

RUSSELL BEUSIE, Respondent, *v.* PECK BROTHERS & COMPANY,
Appellant.

Plaintiff's complaint alleged in substance, among other things, that he was the owner of letters patent, securing to him the exclusive right to manufacture and sell a certain machine; that he granted to defendants the right to manufacture and sell the patented machine, the latter to pay a specified royalty; that defendants, for the fraudulent purpose of competing with and underselling the plaintiff, manufactured a machine resembling the plaintiff's, but of less value. The relief asked was an injunction, an annulment of the license, damages, etc. On the trial, plaintiff abandoning the grounds set out in the complaint, proceeded as for a recovery of royalties on the machines sold. Defendants offered in evidence the letters patent; these were objected to and excluded. *Held*, error; that they were competent upon the question as to whether defendants were manufacturing and selling the machine invented by plaintiff. Defendants did not plead a rescission of the contract with plaintiff, but were permitted to give in evidence a letter from plaintiff alleging a failure on the part of defendants to perform the contract, and stating that he considered that they "have forfeited their right under it," that he should no longer "consider himself bound by it," and that he

would hold them responsible for any damage that may occur to him from their further manufacturing the patented machine; also evidence that soon after receipt of the letter defendants returned to plaintiff the patterns, and that they ceased manufacturing said machines after receipt of the letter. The court charged the jury that they were not to consider the question of rescission, and refused to charge that if the parties mutually agreed to rescind, plaintiff could only recover royalties up to the date of rescission. *Held*, error.

(Argued June 14, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action upon a contract.

The following is the opinion in full:

"The plaintiff was the owner of letters patent of the United States, securing to him the exclusive right to make, use and sell a lawn sprinkler, and, by an agreement in writing with him, the defendant acquired the sole right to manufacture and sell the patented machine. The contract called for the performance of certain acts on defendant's part, and the payment of a certain royalty. In the following year disputes occurred between the parties, and this action followed.

"The complaint set up the making of the contract, and alleged a violation by defendants of their contractual obligations in certain respects stated, and the fraudulent practice of competing with and underselling the plaintiff upon the market by a machine resembling the plaintiff's, but inferior and of less value. The relief prayed for was an injunction, the annulment of the contract, damages and an account of sales. The answer admitted the contract, denied performance by plaintiff, averred a faithful compliance on the defendant's part, denied the alleged breaches and fraudulent practices, set up the difficulty of selling plaintiff's machines by reason of the excessive price fixed for their sale, and alleged that to supply the demand at a less price they did make and sell a sprinkler of their own which did not infringe upon the plaintiff's. When the parties came to trial, a number of years

after the issues were joined, the plaintiff, after putting in the contract and endeavoring to prove by the evidence of one of the defendants and of two expert witnesses that certain machines made by the defendants were actually the same in operation and result as the plaintiff's, rested, the concession being made as to the amount of royalties due, if any were due. The defendants, on their side, offered the plaintiff's letters patent in evidence, but they were not admitted. The rest of their case consisted in evidence tending to show a mutual abandonment of the contract in the year following its making, and in the evidence of witnesses to show characteristic differences in the two machines; sundry attempts to prove that the principle of plaintiff's machine was long previously known, or what the plaintiff's patent covered, having failed under the judge's rulings.

"The plaintiff, in rebuttal, endeavored to prove the differences in the machines. The trial judge submitted to the jury this one question: 'Do each of the three lawn sprinklers, exhibits B, C and D, substantially embody the same device or idea and accomplish practically the same results by means of the same mechanical principles?'

"The looseness with which this action was tried out and the disregard by the parties of the particular issues tendered by the pleadings would dispose us to let the judgment stand as a final settlement between these litigants if it were possible. But two errors, which are pointed out by the appellants, were sufficiently grave to require us to order a new trial. The plaintiff, abandoning the grounds set out in his complaint, proceeded as for a recovery of royalties upon the lawn sprinklers which the defendants had made and sold. When the defendants offered in evidence the letters patent issued to the plaintiff they should have been received. Their exclusion presents the first of the two serious errors committed in the trial. The plaintiff's objection was upon the ground of their immateriality, but they were very material in aid of a proper understanding as to what the patent covered and the contract called for. If the defendants were liable for royalties it was because they were manufacturing and selling the particular machine which was invented and owned by the plaintiff, and

as to which the contract spoke into which they had entered. The letters patent were receivable in evidence to aid in the construction of the claim which was set up against the defendant. Upon no conceivable ground could they be properly excluded upon the issue tried, and it is not easy to perceive how their introduction could prejudice any legal right of the plaintiff. The very question presented to the jury, if we should concede its propriety in such an action, would require the presence in the evidence of the patent record and its construction by the court for the understanding by the jury of the rights and obligations of the parties under the contract.

"The appellants excepted to that part of the charge which instructed the jury that they were not to consider the question of the rescinding of the contracts. The trial judge assigned as a reason that there was no evidence upon that point. He also refused to charge that if the parties mutually agreed to rescind the contract, in April, 1874, that nothing can be recovered except royalties on the Brusie machine up to that date. In these rulings the trial judge greatly erred. It is true the answer did not plead rescission as a defense, but in the way the cause was tried and the precise issues mutually disregarded, we must hold that upon the issue as tried the defendants were entitled to have the jury pass upon the question of whether there had, or had not, been a mutual agreement to rescind, upon the evidence of the acts and conduct of the parties. This evidence consisted in a letter written by plaintiff in April, 1874, a few months after the contract, in which upon the ground therein stated of a failure by the defendants to perform the terms of the contract, the plaintiff said he considered that they 'have forfeited their right under it;' that he shall no longer 'consider himself bound by it,' and 'shall hold them responsible for any damage that may occur to him by the further manufacture or sale of the lawn sprinkler by them.' No answer was made to this, apparently, but the patterns were, a few days thereafter, returned to plaintiff upon his insistence and the defendants' treasurer testified that they 'ceased manufacturing the machines known as the Brusie machines after receiving his notice,' and, again, that 'it was not till we had received written notice that we ceased

manufacturing.' If the jury believed, upon this evidence, that the defendants had ceased to continue under the contract and that there had been a mutual rescission of the contract, the right of recovery under this action would have been limited to that time. For any violation of the plaintiff's patent rights, such as could be claimed after the contract had ceased to exist, the plaintiff's remedy was by another action and in another forum. While the plaintiff was resting upon his contract and claiming a liability in the defendants to make payments by force of its terms, it certainly was competent for the defendants to show that the contract had been mutually rescinded. Indeed, the plaintiff's counsel seems to have thought so, for he made no objection to the evidence offered on that point.

"For the errors mentioned, the judgment below should be reversed, and a new trial ordered, with costs to abide the event."

Robert Sewell for appellant.

D. J. Dean for respondent.

Per Curiam opinion for reversal.

All concur.

Judgment reversed. _____

185 626
151 568

THE BAGLEY AND SEWALL COMPANY, Respondent, *v.* THE
SARANAC RIVER PULP AND PAPER COMPANY, Appellant.

A written contract for the manufacture and sale of certain machines to be used in the manufacture of wood pulp, contained a guaranty on the part of the vendor that the machines would take care of all the pulp produced from "four Scott grinders." In an action to recover the contract price, defendant set up as a counterclaim a breach of this guaranty. It appeared that such grinders were constructed of different productive capacities, and that defendant had contracted for four of said machines. *Held*, that plaintiff was properly permitted to show that the guaranty was given upon the representation of defendant that the "Scott grinders" contracted for had the capacity to produce a certain amount of pulp, and that the machines furnished would care for that quantity; that the receipt of the evidence was not in conflict with the rule excluding oral evidence to contradict or change a written instrument, as the evidence did not contradict, but simply explained the contract.

(Argued June 15, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 30, 1891, which affirmed a judgment in favor of plaintiff, entered upon a verdict and denied a motion for a new trial.

This was an action to recover the contract price for certain machinery sold by plaintiff for defendant.

The facts, so far as material, are stated in the opinion.

"The guaranty for the breach, of which the defendant sought to counterclaim damages, is contained in the written proposition made by the plaintiff to the defendant October 30, 1888, and orally accepted by the defendant, for the sale to the defendant of two 'wet machines,' to be used in the manufacture of wood pulp, after the process of grinding the pulp had been done by other machines constructed for that purpose.

"The clause of guaranty is as follows: 'We will guaranty the above machines to take care of all the pulp produced from four Scott grinders, and deliver the pulp 50 per cent dry.' When the proposition was made, the defendant was engaged in erecting a pulp mill on his premises, and had contracted with the manufacturer of the Scott grinders for four grinders to be placed in the mill. They were subsequently placed in the mill, as were also the machines purchased from the plaintiff.

"The defendant, in support of its contention, gave evidence tending to show that the machines bought of the plaintiff would not take care of all the pulp produced by the four grinders placed in the mill, and deliver it fifty per cent dry. The four grinders would produce about eight tons of pulp a day, and the machines purchased of the plaintiff, while they would provide for that quantity, would not deliver it fifty per cent dry, but forty to forty-five per cent dry. It was established on the part of the plaintiff that the machine would take care of at least six tons of pulp per day, and deliver it fifty per cent dry, being an amount equal to 3,000 pounds of pulp for each grinder.

"The plaintiff in answer to the alleged counterclaim was permitted to show that the guaranty was given upon the representation of the defendant that the Scott grinders, for which they had contracted, had a capacity of producing each 3,000

pounds of pulp per day, and that the proposition and guaranty were based upon this production. The point insisted upon in behalf of the defendant is that this evidence was inadmissible, because in violation of the rule excluding oral evidence to contradict a written contract. Whether this evidence was in violation of the rule invoked is the main question in the case. The negotiation between the parties did not have its inception at the date of the proposition (Oct. 30, 1888). On June 27, 1888, the defendant addressed a letter to the plaintiff saying: 'We have already made a trade for four grinders, that are guaranteed each to make 3,000 pounds every 24 hours, dry weight, and now we want to get a press to take care of it.' In another letter of October 16, 1888, the defendant said: 'The machines we are putting in are guaranteed each to make 3,000 pounds, dry weight, pulp each 24 hours, or the four machines will turn out six tons a day. Now will one of your 72-in. machines take care of this amount of pulp?' The conversation between the parties concurrently with the date of the proposition (Oct. 16, 1888), shows that the guaranty was made upon the basis that the capacity of the Scott grinders to be placed in the mill was 3,000 pounds of pulp per day.

"The inequity of the alleged counterclaim is apparent. But this is no answer to the rule of law invoked, if by its proper application it excludes a consideration of the facts referred to.

"We think it may well be doubted whether the letters of June 27, 1888, and October 16, 1888, may not be considered as parts of the written contract for the sale of the machines. The proposition of guaranty of October 30, 1888, was its culmination, but the previous letters of the defendant explain the application of the guaranty, and being themselves in writing their consideration does not contravene the principle upon which oral terms are forbidden to be engrafted upon written contracts. But passing this we are of opinion that the oral evidence was competent to ascertain and define the capacity of the grinders to which the guaranty related. The parties were contracting for machines which would take care of the pulp produced by 'four Scott grinders,' and deliver it at a certain dryness. The amount of pulp produced depends, as

the evidence shows, upon the capacity of the grinders and the power applied. Scott grinders are manufactured of varying capacity. The plaintiff had no knowledge of the capacity of the grinders which were to be placed in the mill, except as informed by the defendant. It would be unreasonable to suppose that in making the contract with the plaintiff, the parties contracted without reference to the capacity of the grinders to be used, or that by the words, 'all the pulp produced by four Scott grinders,' the parties intended all the pulp which could be produced by any Scott grinders operated with any power, however great. The extrinsic circumstances show that they had reference to the production of the four grinders contracted for, having the capacity represented by the defendant.

"In interpreting the guaranty, parol evidence identifying the machines known as Scott grinders is essential. The fact that the grinders are of different productive capacity, involves the further inquiry, to grinders of what capacity did the parties refer. This we think was the subject of explanation by parol evidence. Such evidence does not contradict the written contract, nor does it add a new term thereto. It simply makes intelligible what needs explanation, and construing the written contract in light of the explanation, full force is given to all the words, without adding to or detracting anything therefrom. (See *Chapin v. Dobson*, 78 N. Y. 74; *Schmittler v. Simon*, 114 id. 177; 1 Green. Ev. § 227 *et seq.*)

"The parol evidence was not admitted to limit the guaranty to a part of the product of the Scott grinders which the parties had in mind, but to show the particular grinders referred to and their capacity, and that the contract related to grinders of that description.

"The conclusion we have reached renders it unnecessary to consider any of the other questions in the case. The facts as to the contemporaneous oral understanding of the parties and the other extrinsic facts are undisputed, and the plaintiff was entitled to judgment thereon.

"The judgment below is therefore affirmed, with costs."

Frank E. Smith for appellant.

Elon R. Brown for respondent.

ANDREWS, J., reads for affirmance.

All concur.

Judgment affirmed. _____

THOMAS G. FROTHINGHAM et al., Appellants, v. ANTHONY J.
G. HODENPYL et al., Respondents.

A general creditor cannot maintain an action to have judgments obtained against his debtor by other creditors set aside on the ground that they were improperly or fraudulently entered; until his claim has been established by a judgment and execution returned unsatisfied he cannot come into a court of equity for assistance to prevent or redress an alleged fraud.

(Submitted June 16, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 14, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The following is the opinion in full:

"This action differs only from that of the *Columbus Watch Co. v. Hodenpyle*, decided at this term,* in the one respect that here the plaintiffs' firm are general creditors of the firm of Stern & Stern; who demanded similar equitable relief against certain judgment creditors of that firm.

"It is sufficient to say that, as creditors at large, they have no right to maintain any such action, or to question their debtors' acts. Such right is gained when the claim of the creditor is established by a judgment and execution returned unsatisfied. Until then, he cannot come into a court of equity for assistance to prevent, or redress fraud alleged. (*Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Dunlevy v. Tallmadge*, 32 N. Y. 457.)

"The General Term have correctly decided the case below and I see no ground upon which this appeal is maintainable.

"The judgment appealed from should be affirmed, with costs."

**Ante*, page 430.

Franklin Bien for appellants.

Hays & Greenbaum for respondents.

GRAY, J., reads for affirmance.

All concur.

Judgment affirmed. _____

LIZZIE V. BEVANS, Appellant, v. LYDIA F. YOUNG et al.,
Respondents.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department entered upon an order made February 9, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Gilbert O. Hulse for appellant.

William H. Crane for respondents.

Agree to affirm, on opinion of General Term.

All concur.

Judgment affirmed. _____

MARY ASTHEIMER, Respondent, v. PATRICK J. O'PRAY,
Appellant.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 11, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict.

E. S. Wood for appellant.

G. D. B. Hasbrouck for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY HOSKINS, as Administratrix, etc., Appellant, v. JAMES STEWART et al., Respondents.

(Argued June 17, 1892; decided October 11, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 15, 1891, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial at Circuit.

Martin J. Keogh for appellant.

Joseph F. Daly for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

HENRY HEYWOOD et al., Appellants, v. WILLIAM M. THACHER, as Assignee, etc., Impleaded, etc., Respondent.

(Argued October 8, 1892; decided October 11, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 3, 1892, which reversed an order of Special Term confirming the report of a referee passing the accounts of an assignee.

Abram Kling for appellants.

Edwin C. Cloyd for respondent.

Agree to dismiss appeal on argument.

All concur.

Appeal dismissed. _____

ELIZABETH A. CULLIFORD, Respondent, v. MONTGOMERY GADD, Appellant.

In pursuance of a stipulation which recited that an undertaking given on appeal to this court had been canceled, an order was entered which gave plaintiff leave to file another "undertaking to perfect the appeal" within five days, and provided that the new undertaking should have when filed the same force and effect as if it had been filed and served

when the first undertaking was given, and that if not filed as specified, the appeal should be dismissed. A new undertaking not having been filed, the appeal was dismissed. Another appeal was thereafter taken and perfected. On motion to strike the case from the calendar, *held*, that the case was placed by the stipulation and order on the same footing as if no undertaking had been given, and the appellant had the right, within the statutory time for appealing, to take and perfect another appeal. Motion, therefore, denied.

(Argued October 8, 1892; decided October 11, 1892.)

MOTION to strike cause from calendar.

The following is the opinion in full:

"The plaintiff is concluded by the order of this court, entered April 9, 1892, upon the stipulation of the parties, which recites that the undertaking given to perfect the appeal had been canceled and annulled in the Superior Court, which, it appears from the papers, was also done by consent, and which granted the plaintiff leave to file another 'undertaking to perfect the appeal' within five days, and to have, when filed, the same force and effect as if it had been filed and served when the first undertaking was given, and the order provided that if not filed and served within that time, that the appeal should be dismissed, with costs, which was subsequently done.

"The case was thus placed, by the act of the parties, upon the same footing as if no undertaking had been given to perfect the appeal, and the appellant had the right, within the statutory time for appealing, to take and perfect another appeal, as his first attempt to avail himself of this right had proved ineffectual. (*Langley v. Warner*, 1 N. Y. 806; *Blake v. Lyon & Fellows Mun. Co.*, 75 id. 611; *Good v. Daland*, 119 id. 153.)

"The motion should be denied, with ten dollars costs.

F. Spiegelberg for motion.

Sidney Harris opposed.

Per Curiam opinion for denial of motion.

All concur.

Motion denied.

JOHN A. NICHOLS, Respondent, v. THE SCRANTON STEEL
COMPANY, Appellant.

The provision of the Code of Civil Procedure (§ 791) which specifies as one of the causes entitled to a preference "a cause entitled to a preference by the general rules of practice" (sub. 10, § 791) does not apply to this court (§ 3347).

To obtain a preference upon the calendar of this court, in a case not designated by said Code or the rules of the court, the application must be addressed to the discretion of the court, upon a showing of such facts as may be deemed to render a preference proper in the interests of justice.

Upon motion for a preference the sole facts relied upon were that certain certificates of stock belonging to the appellant had been levied upon by virtue of and were held under an attachment issued in the action. *Held*, that this did justify the granting of the motion.

(Argued October 3, 1892; decided October 11, 1892.)

MOTION for a preference upon the calendar.

The following is the opinion in full:

"A preference is claimed by the appellant upon our calendar, on the ground that the property of the defendant is held under attachment, and subdivision 10 of section 791 of the Code is relied upon. That provision adds to the list of causes to be preferred, 'a cause entitled to preference by the general rules of practice, etc.' The rules referred to are those of the Supreme Court, and rule numbered 36 requires that 'if the property of the defendant be held under attachment, the action shall be placed on a preferred calendar.' This rule does not furnish, of itself, a reason for a preference upon the calendar of this court. Section 791 of the Code is expressly restricted in its operation by section 3347. By subdivision 6 of that section it is provided that chapter VIII, in which section 791 is found, applies only to 'proceedings taken in an action or special proceedings in one of the courts specified in subdivision fourth of this (3347) section,' excepting certain specified sections, among which section 791 is not given. The subdivision fourth referred to specifies courts other than the Court of Appeals. Section 3347 was enacted to regulate the application of certain portions of the Code. An exception to such application is provided for where the particular provision

in a chapter, specified in a subdivision of the section, expressly designates the courts, in which case the provision is deemed excluded from the application of the subdivision.

"In section 791, certain subdivisions do expressly designate, or include this court, but in subdivision 10 the preference is made to depend on the Supreme Court rules. Therefore, to obtain a preference upon the calendar of this court, in a case where it is not designated by the Code, or in our rules, the application must be addressed to the discretion of the court, upon a showing of such facts as may be deemed to render a preference proper to be awarded in the interests of justice.

"In this case the bare fact is made to appear in the moving papers that the sheriff levied upon certain certificates of stock belonging to this defendant, and in the possession of another party, and that the certificates continue to be held under that attachment. This is not such a showing as to justify us in proffering the argument of appeal over other causes on the general calendar.

"The motion should be denied, but, under the circumstances, without costs."

Wilson & Wallis for appellant.

H. P. Starbuck for respondent.

GRAY, J., reads for denial of motion.

All concur.

Motion denied.

HENRY W. STEINHOUSER, as Assignee, etc., Respondent, v.
JOHN MASON, Appellant.

An executor of an assignee for the benefit of creditors is not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee, unless the executor has been substituted as assignee.

(Argued October 4, 1892; decided October 11, 1892.)

THIS was a motion to substitute Mary C. Steinhouser executrix of the will of Henry W. Steinhouser, as plaintiff in the above entitled action, which was brought by plaintiff as assignee for the benefit of creditors of Charles Magnus.

The following is the opinion in full :

"This is simply a motion to substitute Mary C. Steinhouser as executrix of the will of plaintiff in his stead. As executrix, so far as any facts now appear, she has no place in the litigation, and no right of substitution. If she has been properly substituted as assignee in the place of her deceased husband, then she should make a motion to be substituted as such in this action, and so far as we can perceive, there would be no answer to such a motion. The moving papers do not disclose the fact that she has been substituted as assignee. This motion must, therefore, be denied ; but as she seems to have been thus substituted since notice of this motion, the denial is without costs."

Franklin Bien for appellant.

Abram Kling for respondent.

Per Curiam opinion for denial of motion.

All concur.

Motion denied.

NANCY E. BANTA, Respondent, *v.* PANANOS HAGGITERIS,
Appellant.

(Argued October 3, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made January 4, 1892, which reversed an order of Special Term requiring from plaintiff a further bill of particulars.

A. J. Fransioli for appellant.

Robert T. B. Easton for respondent.

Agree to affirm ; no opinion.

All concur.

Appeal dismissed.

MARY KIEFER, as Administratrix, etc., Respondent, v. THE
GRAND TRUNK RAILWAY COMPANY of Canada, Appellant.

(Submitted October 3, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made January 5, 1892, which reversed so much of an order of Special Term as imposed terms upon plaintiff as a condition of extending the time within which a commissioner appointed by the court to execute an open commission might execute the same.

Sprague, Morey, Sprague & Brownell for appellant.

J. W. Russell for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

MELVIN STEPHENS, Respondent, v. ROBERT LEWIS HUMPHRIES,
Impleaded, etc., Appellant.

(Submitted October 3, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 13, 1892, which affirmed, as far as appealed from, an order of Special Term setting aside a sale on foreclosure.

John K. Van Ness for appellant.

Albridge C. Smith for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MATTHEW T. TRUMPBOUR, Appellant.

(Argued October 5, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made June 1, 1892, which reversed a judgment in favor of defendant entered upon an order sustaining a demurrer to the indictment herein.

David M. De Witt for appellant.

Augustus Schoonmaker and *J. N. Vanderlyn* for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

ANNA M. ARNOLD, Appellant, v. NORFOLK AND NEW BRUNSWICK
HOSIERY COMPANY, Respondent.

(Argued October 3, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made August 18, 1892, which affirmed on certain conditions an order of Special Term vacating a judgment against the defendant and permitting it to serve an answer.

Frank E. Blackwell for appellant.

Walter D. Edmonds for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

THE PEOPLE ex rel. GROVE WEBSTER, Respondent, v. WILLIAM T. VAN TASSELL, Sheriff, etc., Appellant.

(Argued October 3, 1892; decided October 18, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made July 2, 1892,

which affirmed an order of the county judge of Ulster county discharging the relator from imprisonment, etc.

G. D. B. Hasbrouck for appellant.

David M. De Witt for respondent.

Agree to affirm on opinion of General Term.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
MATTHEW T. TRUMPBOUR, Appellant.

(Argued October 3, 1892; decided October 25, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 3, 1892, which denied a motion to dismiss an appeal from a judgment in favor of defendant sustaining a demurrer.

David M. De Witt for appellant.

Augustus Schoonmaker and *J. N. Vanderlyn* for respondent.

Agree to affirm on opinion below.

All concur, except MAYNARD, J., not sitting.

Order affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
FRED McGUIRE, Appellant.

(Argued October 5, 1892; decided October 18, 1892.)

APPEAL from judgment of the Court of Oyer and Terminer in and for the county of Orange, entered April 22, 1892, upon a verdict convicting defendant of the crime of murder in the first degree.

The following is the opinion in full:

"It is so entirely clear that the murder charged in the indictment was committed either by the prisoner or Sarah Brown, that the learned counsel for the former frankly admitted the fact upon the argument, and so left in the case only the inquiry which of the two was guilty of the crime.

Each charged it upon the other, and both as witnesses upon the trial gave their version of the facts, and it is not difficult upon a comparison of their respective accounts of the transaction to determine where the truth really is.

"They started from their home together and went to the neighborhood of Gregory's house. Both knew that money was kept there, and largely overestimated the amount. Both had talked over the project of robbery and apparently were ready to commit that crime if it could be done with safety. The man says that they left home for the innocent purpose of gathering nuts, and that in pursuit of that occupation they came to the edge of the woods near Gregory's; that the woman then said she was going to Gregory's; that the prisoner asked what for, and she merely replied 'wait till I return;' and that when she came back she said she 'had murdered the dirty old wretch.' She had never before been in the house, had no acquaintance with and so no personal hostility to Mrs. Gregory, never even asked McGuire to go with her or aid her in the enterprise, and did not tell him her purpose, although she knew he had talked about the robbery and certainly had displayed no aversion to the act. The story, as he tells it, is not very easy of belief. On the other hand she testifies that they left home for the understood purpose of effecting the robbery which had often been talked about; that she tried to persuade the defendant to abandon his purpose, but he persisted; that he left her to wait for him at the barbed wire fence; that, on his return he said he had killed Mrs. Gregory but wished he had not; and that he hid the pistol, the pocket book, the money, and the mask which he had made, in the woods where they were afterwards found. Knowing, as we do, that one account or the other is substantially true, although both witnesses were more or less unreliable, there is very little doubt which should have our belief. And even that doubt is dispelled when other features of the evidence are considered. Mrs. Gregory was both shot through the head and cut and mangled and bruised almost beyond recognition. Her blood was everywhere; on the floor and on the door and spattered in all directions. The broken vessel of earthenware showed with what weapon the cuts and bruises were made. The murderer

left the scene through the front door. The blood on his hands stained its knob, left finger marks on the sides, and the outline of a heel on the porch. And yet the prisoner, telling his story to save his life, confesses that when Mrs. Brown returned to him he saw no blood upon her anywhere, on face or hands or dress, and no witness in the case was able to find upon her clothing any such marks of guilt, although she wore for the first time a light calico dress which she continued to wear thereafter. If she was the guilty person what we know of the death scene makes it certain that the blood of her victim would have been plainly visible upon her in the daylight of her return. In addition he declares that he saw her have no weapon, although beyond question the shots were fired from his own revolver. On the contrary she testifies that he returned with blood stains upon him; that they were on his pants and on his shoes; that he wore two coats when he started from home, a black coat over a red one; that he left the black coat with her at the fence and on his return put on the black one and buried the red one which he later dug up and burned, and she adds that he rubbed out most of the stains on his pantaloons with a piece of lining torn from the coat, but one refractory spot he pounded out with a stone and she sewed a patch over the rent. The garment with the patch on it was produced, and all the prisoner could say about it was that he could not tell how the patch, or the hole it covered, came to be there. Comparing the statements of the two witnesses we are obliged to say that even if the woman be regarded as an accomplice her evidence is strongly corroborated in material respects by that of the prisoner himself, and strengthened by the falsity of his statements when first accused. He denied totally his presence at Gregory's or near there on that afternoon, asserting that he went to the asylum in pursuit of work, and denied also possession of the small revolver. The falsity of both statements he admitted as a witness, assigning as an excuse a desire to screen Mrs. Brown when the most probable object was to screen himself.

"A distinct confession of his guilt made by him to Brazington was sworn to by the latter. He cannot be regarded as an accomplice in the commission of the crime.

When it was done he was at work with Gregory in the celery field and never was gone for a moment. There is no evidence that he knew before hand of the expedition to Gregory's on that day, or in any manner aided or abetted it. There is proof that he had talked approvingly of a robbery, and even started once with McGuire to effect it, but he is in no manner connected with the actual offense committed except by his silence after he heard of it. He says that McGuire confessed to him that he committed the crime and gave him the twenty dollar gold piece and some other money stolen from Gregory not to tell. The prisoner's counsel calls the story improbable, and criticizes it as telling of a crime and then buying the listener's silence when it was easy not to tell at all. But that is not a just criticism. What had previously passed between the two with reference to a robbery was quite enough, when it occurred, to enable Brazington to be sure that McGuire was the perpetrator. The latter knew that the former would be confident of it, and a denial to him useless. He took what seemed to him the safer course of telling him the truth and bribing him to silence. So that neither the want of corroboration of Mrs. Brown's evidence, nor the criticism upon Brazington's are well founded.

"The defendant's counsel urges that the proof given of practice at shooting at a mark by McGuire, Mrs. Brown and Brazington, or some of them was improperly admitted. It was competent evidence although of very slight importance and can scarcely be said to have influenced the verdict.

"The trial was conducted with extreme solicitude for the rights of the prisoner, the charge to the jury was so fair and just that his counsel not only took no exception to it, but expressed his entire satisfaction, and the verdict is well supported by the evidence.

"The judgment must be affirmed."

Wilton Bennet for appellant.

M. H. Hirschberg for respondents.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

WILLIAM I. THORN, Respondent, v. OLIVER T. BEARD,
Appellant.

(Argued October 6, 1892; decided October 18, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 13, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion which is given in full:

"This action was brought by an attorney to recover for services rendered to his client. They covered a period extending from September, 1887, to March or April of 1889. During that time a suit was brought for the construction of the will of William Beard, in which the interest of the defendant was quite seriously involved, and a proceeding was instituted for the settlement of the accounts of the executors named in that will. In each of those litigations, the defendant was represented by counsel other than Thorn, and the latter participated in the character of guardian *ad litem* for certain of the infant children of the defendant, whose interests under the will were certainly adverse to those of their father. He was seeking to divert income to himself, which otherwise would accumulate for the benefit of the children as remaindermen. During the progress of these litigations, there was much of consultation and conversation between the two parties about the will and its construction, and the action and accounts of the executors. Upon the entry of final judgment in the equity suit, an allowance was made to Thorn, as guardian of \$500. He took the money, but was discontented with its amount, and presented a bill for \$7,000 against the defendant, for \$5,000 of which he had presented a sworn claim to the court as due to him in the capacity of guardian. The defendant refusing to pay, this action was brought. The courts have held that Thorn's position as guardian for the infants was inconsistent with any action as counsel for the defendant in the then existing litigations, and refused to permit a recovery for the services claimed to have been rendered, and that determination was so clearly correct as scarcely to require discussion.

“But beyond what was involved in the equity suit and the accounting before the surrogate, there seem to have been two questions raised by the defendant which were important to him, and as to which the interest of his children was identical with his own. These were whether the executors under the will were entitled to commissions, not only as such, but also as trustees under the trust provisions of that instrument; and whether a bill of sale for a dredge plant executed for a nominal consideration by the testator to one of his sons could be set aside. A successful result of these inquiries would have necessarily added large sums to the estate, and benefited alike the defendant and his children. Thorn claimed to have rendered services in those directions upon the request of the defendant and has recovered a judgment therefor, which is assailed on this appeal, but I am unable to see how it can be sustained.

“The two subjects came up while the litigations over the will were in progress. Thorn testifies that he told defendant that neither question was involved in, or could be determined by, the suit for construction of the will, or the accounting of the personal estate which were in progress; that defendant's remedy would be by an action thereafter to be commenced to remove the executor who held the bill of sale, and restore the subject-matter of it to the estate; but that he, Thorn, would not enter upon that litigation unless he could entirely control it. I quote his testimony: ‘I said, we will go through this matter, but when we come to the suit, for the accounting, and for the discharging of the trustees, I am going to do the business in my own name and in my own way, or I won't do it; you have put me to a great deal of trouble here; you are tenacious; I will run your litigation, or you will run it. Well, he says, I engage you now to run that litigation, do you hear? ‘Yes; in my name?’ ‘Yes.’ Well, I have fished behind the net long enough, and I cannot handle myself, and I intend to be where I can protect myself fully, and I want you to talk a great deal less, if you will, colonel, and let me have my own way a good deal more or less; I want you to let me alone; Mr. N. B. Haight was present when that conversation occurred, and the thing was discussed thereafter, and it was understood

that just as soon as we got the judgment perfected and matters straight in this construction suit that that matter, then fully discussed, was to be started in action, Oliver T. Beard against the balance. Q. Were you posted and prepared to commence that action and carry it through? A. I think I was as we understand; I knew all about it, and I knew how to commence it except in details. Q. After the completion of that other suit fixing as to income that suit was not commenced? A. We split.' He testified again that when the subject of the bill of sale to defendant's brother came up in a discussion over the accounting he told the defendant 'to let it alone and it would all come up in the big suit.' It seems to me to be the just result of the testimony that, while Thorn was acting as guardian *ad litem* for the infants he was also more or less advising defendant in directions hostile to their interests; that in the course of those discussions the double commissions which might or might not be charged and the bill of sale were talked about; that those matters were incidental and came up at first before the relation of attorney and client was established between Thorn and defendant; that it was not to be established until after the existing litigations were out of the way and Thorn left unhampered by his position as guardian *ad litem*; that he refused to be employed in his existing situation, and only on condition that he could act in his own name and in his own way; and that the only employment by defendant to which he anywhere testified was a retainer to bring an independent suit after the close of the existing litigations. Now that suit he never brought. He did not enter upon the stipulated employment. He never even offered to bring it or tendered his services for that purpose. On the contrary he presented an unjust bill, and then sued upon it, making impossible the future relation contemplated. In other words, he neither performed, nor offered to perform, the contract of employment to which he testified, but put himself in an attitude toward the defendant which would have justified the latter in refusing his services if he had tendered them. And beyond that I can discover no evidence that Thorn did any labor or performed any work after the contract of employment, and by reason of that engagement in the way of prepara-

tion for the future suit contemplated. What he says about the double commissions is this: 'Whether they had a right to single or double commissions was the serious question that he made; I had none. Q. That question never, as matter of fact, arose at all? A. Never as yet, because he did not bring that suit.' And he says elsewhere that he stopped the defendant's discussion of the subject, saying he knew all about it and was devoting time to it in another very important case. I cannot find that he ever advised the defendant one way or the other upon the question, but kept his knowledge and opinion to himself, evidently intending to wait until the question in some way arose, although apparently it did arise and was decided in the accounting before the surrogate, and so came within the duties of the guardian. So far as the bill of sale is concerned he seems to have done nothing and had not investigated the details. It seems to me to be beyond dispute that he neither did the service he was employed to do or made any special preparation for its performance. The question was fairly raised on the trial by a motion for a nonsuit and by an exception to so much of the charge as related to the bill of sale of the dredge plant. We think the nonsuit should have been granted.

"The judgment should be reversed and a new trial granted, costs to abide the event."

Oliver T. Beard for appellant in person.

Wood & Morschauser for respondent.

FINCH, J., reads for reversal and new trial.

All concur.

Judgment reversed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOSEPH DAVIS, Appellant.

(Argued October 5, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made July 2, 1892, which affirmed a judgment of the Court

of Sessions of Albany County entered upon a verdict convicting defendant of the crime of grand larceny in the second degree, and also affirmed an order denying a motion for a new trial.

P. D. Niver for appellant.

James W. Eaton, District Attorney, for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JOHN SULLIVAN, Respondent, *v.* THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Appellant.

(Argued October 6, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 26, 1891, which overruled defendant's exception and ordered judgment on verdict in favor of plaintiff, directed by the trial court.

Sidney J. Cowen for appellant.

Agree to reverse judgment and grant new trial on authority of *Higgins v. Mayor, etc.* (131 N. Y. 128).

All concur.

Judgment reversed. _____

GEORGE B. GALLUP, Appellant, *v.* AUGUST BELMONT et al.,
Respondents.

(Argued October 6, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court of the third judicial department, entered upon an order made November 30, 1891, which reversed an interlocutory judgment overruling a demurrer to the complaint.

J. Newton Fiero for appellant.

Grosvenor P. Lowery for respondents.

Agree to affirm on opinion of LEARNED, J., at General Term.
All concur.

Judgment affirmed. _____

THEODORE BUTTERFIELD et al., Respondents, v. HENRY E.
OPPENHEIMER et al., Appellants.

(Argued October 7, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict and affirmed an order denying a motion for a new trial.

George Carlton Comstock for appellant.

William Townsend for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

PHILOMENA GIRALDO, an Infant, by Guardian, Respondent, v.
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY,
Appellant.

(Argued October 7, 1892; decided October 25, 1892.)

APPEAL from judgment of the Supreme Court in the second judicial department, entered upon an order made December 7, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

William N. Dykman for appellant.

John C. Kennedy for respondent.

Agree to affirm; no opinion.

All concur, except EARL, Ch. J., PECKHAM and GRAY, JJ., dissenting.

Judgment affirmed.

JOHN EVERS, Jr., an Infant, by Guardian, Respondent, v.
JONAS WEIL et al., Appellants.

(Argued October 7, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1891, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a verdict.

Otto Horwitz for appellants.

Jacob Fromme for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Estate of PETER CAIN, Deceased.

(Argued October 7, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1891, which affirmed a final order made by the surrogate of the county of New York, directing a payment by the executors of Peter Cain, deceased, to be made upon a legacy to Sarah Cain under the will of their testator.

Thomas McMahon for appellants.

James O'Neill for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ALFRED HUMPHREYS, Respondent, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

(Argued October 10, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 30, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

E. Countryman for appellant.

Isaiah Fellows, Jr., for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

NICHOLAS W. WALSH, as Executor, etc., Respondent, v. MARIE WALDRON et al., Appellants, et al., Respondents.

(Argued October 10, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 18, 1892, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

Michael J. Scanlan for appellants.

David M. Newberger and *Ezekiel Fixman* for respondent.

Agree to affirm on opinion of General Term.

All concur.

Judgment affirmed. _____

SARAH A. SWIFT, an Infant, etc., Respondent, v. THE STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY, Appellant.

(Argued October 10, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an

order made the second Monday of February, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Albert B. Boardman for appellant.

James C. Foley for respondent.

Agree to affirm on decision on former appeal. (123 N. Y. 646.)

All concur, except GRAY, J., not voting.

Judgment affirmed.

JOHN E. BURKE, an Infant, etc., Appellant, v. THOMSON
METER COMPANY, Respondent.

(Argued October 11, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn entered upon an order made April 8, 1892, which modified and affirmed as modified a judgment in favor of defendant entered upon a decision of the court on trial at circuit.

Alfred C. Coursen for appellant.

Charles J. Patterson for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

JULIUS LEHMAN, as Receiver, etc., Respondent, v. GEORGE F.
BENTLEY, Appellant.

(Argued October 11, 1892; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made May 2, 1892, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

John B. Uhle for appellant.

John P. Wickes for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

JOHN BROOKS, Appellant, *v.* SAMUEL B. DICK et al.,
Impleaded, etc., Respondents.

Where a committee of railroad mortgage bondholders appointed on foreclosure sale of the mortgaged property, for the purpose of effecting a reorganization, enter into a contract within the scope of the authority given to them, an action to have the contract adjudged null and void is not sustainable, in the absence of any claim of fraud on the part of those contracting with the committee or participation on their part in some fraud of the committee; it is not sufficient to aver conduct on the part of the latter which might as between them and the bondholders amount to a violation of their trust duties.

(Argued October 17, 1892 ; decided October 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made November 13, 1891, which affirmed a judgment in favor of defendants, entered upon an order sustaining a demurrer to the complaint interposed by defendants Samuel B. Dick and Arthur C. Huidekoper.

This action was brought by plaintiff as a bondholder of the Shenango and Alleghany Railroad Company, a Pennsylvania corporation. The complaint alleged the following facts among others: The railroad of said company was sold under decree in foreclosure, and purchased by a bondholders' committee. The committee was authorized to take all proper action for a reorganization and consolidation with other companies of the property as they might see fit, and for the payment of outstanding obligations up to the time of such reorganization. Acting under this authority the committee entered into a contract with said defendants Dick and Huidekoper, by which it agreed to issue to them certain bonds and stock of a successor company, to be called the Pittsburgh, Shenango and Lake Erie Railroad Company, defendant herein in consideration of the perform-

ance by said contractors of their agreements therein made to cause such consolidation to be effected, and pay off certain debts and liens then existing upon the property. The complaint charges that this contract is unlawful and designed to give to said Dick and A. C. Huidedoper undue advantage over the company and its bondholders, without proper consideration, and it is alleged that one of the committee is attorney for the contractors, and another was a creditor whose debt was assumed and agreed to be paid by the contractors; that said members of the committee abused their powers as members in themselves executing the agreement. It is also charged that certain of the outstanding obligations so agreed to be liquidated by said contractors, either had no existence in fact or were purchased by them from their original holders for a small proportion only of their face value. The relief asked was that said contract be declared null and void; that the new company be enjoined from delivering to the contractors bond and stock as required by the contract.

Further facts are stated in the opinion which is given in full:

“The demurrer interposed to the complaint raises the question whether any cause of action was pleaded as against the two parties demurring. It is their contract with the committee of reorganization which is sought to be annulled, and the inquiry is whether any conduct of their own justifies the intervention of a court of equity. They are independent contractors. They stand in no trust relation to the bondholders of whom the plaintiff is one and owe them no trust duty. Their right to contract in their own interest is clear, and unless some fraudulent representations on their part, or some fraudulent concealment induced the contract, or they took some dishonest advantage of the parties with whom they dealt there is no ground for interfering with their contract. The complaint alleges no facts of that character. The extreme limit to which it goes consists in the allegation that certain debts which they covenanted to pay were debts owing to one or more members of the bondholders' committee with whom their contract was made, and that others were either overestimated or had no real and honest existence. There is no allegation that they knew of any such fact when they made their agreement, or

represented anything to the committee on the subject, or were interested in any false or simulated debts. The Peninsular Car Co. judgment they owned, and if they bought it at less than its face they were under no obligation to give the consenting bondholders the profit on their purchase. The Reed judgment of \$75,000 is said to have had "no existence in fact," but was "used as a pretext to swell the indebtedness." It seems to be admitted that there was such a judgment in form, and yet in some way defective or fraudulent and having no honest foundation. It is not pretended that the committee knew of the defect or even that the contractors had any such knowledge or represented or concealed anything about it, much less that they were at all interested in it. Presumably the list of debts to be paid was furnished them by the committee, who included in it whatever there was reasonable ground to believe the company might be liable to pay, and there is no allegation that either party knew the Reed judgment not to be such an obligation. One of the debts included in the schedule appeared to be due to a receiver of one of the companies who was also a member of the contracting committee. There is no averment that it was not an honest debt and honestly due and which would necessarily need to be paid in the process of reorganization, or was to any extent unfairly or unreasonably estimated, but, however, that may be, the demurring contractors were in no manner responsible for its character or required to enforce the trust duties due from the committee to the bondholders whom they represented. It is enough that they are not shown to have been interested in or parties to any such breach of faith. The same thing is true of the debt to the Exchange Bank and F. W. Huidekoper's interest therein.

"The complaint shows what the authority of the committee was. It was carefully put in writing and signed by the plaintiff himself. The contract made with the demurrants was clearly within the scope of that authority and until some facts are averred which tend to show a fraud on the part of the contractors, or a participation in some fraud of the committee it is not enough to aver conduct on the part of the latter which might amount as between them and the bondholders to

a violation of their trust duties. While there are in the complaint loose general charges of fraud and conspiracy, no facts are averred which involve the agreement of the contractors in legal invalidity. There is an allegation that one of the committee was when appointed the attorney of the two contractors. But they could not appoint him and did not appoint him, and it is not distinctly averred that he continued to be their attorney when the contract was made, or was their attorney in any matters whatever which fell within the scope of the contract. To extend the equitable rule invoked to such a case would carry it to contracts where among the vendors were personal friends or relatives of the vendees, and give it a range and scope almost without a boundary. Such facts might have some weight in establishing an actual fraud or collusion, but are wholly insufficient to set in operation the equitable doctrine which denies to the same man the right to contract on both sides of the agreement when his right is challenged by those to whom he owes trust duties.

"I have said briefly that the contract made was within the authority conferred by the bondholders upon their committee. I base that conclusion upon the whole scope of the power conferred, which looked not only to a reorganization, but to a consolidation with some other company, and contemplated a use of the common fund for whatever was necessary or incidental to the purpose authorized, but especially upon the tenth and fifteenth clauses of the agreement marked A, which authorize a further consolidation, the payment of debts and expenses and removal of liens, and a sale of a part or the whole of the common fund or estate. The case, therefore, shows authority to make the contract, a free action of independent contractors, and no fact warranting an inference of collusion or fraud.

"The judgment should be affirmed, with costs."

Wm. Safford for appellant.

Frank Sullivan Smith for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

135	656
168	1863
168	*365

PEOPLE ex rel. HENRY DAY, as Trustee, etc., Respondent, v.
EDWARD P. BARKER et al., as Commissioners of Taxes, etc.,
Appellants.

SAME v. SAME.

Where securities belonging to a trust fund were in the possession of three trustees, jointly in another state, two of the trustees being residents of that state, and the other of this state, *held*, that they were not taxable in this state under the act of 1833 (Chap. 392, Laws of 1833), declaring that "all debts and obligations for the payment of money due or owing to persons residing within this state, * * * wherever said securities shall be held, shall be deemed for the purposes of taxation personal property within this state, and shall be assessed as such to the owner or owners."

Also *held*, that the question was not affected by the fact that such securities were bonds secured by mortgages upon lands in this state.

(Argued October 17, 1892; decided October 25, 1892.)

APPEALS from orders of the General Term in the first judicial department, made February 18, 1892, which affirmed orders of the Special Term adjudging illegal and erroneous the action of tax commissioners in assessing the personal estate of the relator.

The following is the opinion in full :

"We are unable to perceive any material distinction between this case and that of *People ex rel. Darrow v. Coleman* (119 N. Y. 137). Here, as there, the securities constituting the trust fund were with a safe deposit company in New Jersey. The beneficiaries were non-residents. The relator and one of his co-trustees are residents of New Jersey, the other trustee residing in Westchester county, in this state. The counsel for the appellants contends that while, in the other case, the non-resident trustee had the possession of the securities in the city where he resided; in the present case neither the relator nor the other non-resident trustee had the custody, or physical control, of the securities, and they did not reside in the particular city where the securities were deposited. The fact is that access to these trust securities was permitted to any two of the trustees, or to one of them when in company with their secretary. But the difference is unimportant. The possession

of the securities was in the three trustees jointly, and not in the relator alone.

"Nor can the description of the securities affect the question; for, although some may have been in bonds secured by mortgages upon New York real estate, they were debts which were due to the three trustees jointly. Assuming the relator may have been residing in New York city on the second Monday of January, 1891, the securities were not within this state at the time, and the act of 1883 (Chap. 392) would not apply, because they were debts or obligations which were not due solely to the relator, if he could be deemed an "owner" within the terminology of the act, but to him jointly with others. Our decision in the *Darrow* case must be regarded as controlling the disposition of the present case.

"The orders should be affirmed, with costs."

George S. Coleman for appellants.

Daniel Lord, Jr., for respondent.

Per Curiam opinion for affirmance.

All concur, except MAYNARD, J., not voting.

Orders affirmed.

JAMES B. AVERY, as Administrator, etc., Appellant, v.
HANNAH MABEY et al., Respondents.

(Argued October 18, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 8, 1891, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

J. H. Clute for appellant.

James F. Tracey for respondents.

Agree to affirm on opinion of General Term.

All concur.

Judgment affirmed.

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WESLEY MANDEVILLE, as Executor, Respondent, *v.* EDWARD
H. AVERY, Impleaded, etc., Appellant.

(Argued October 13, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 8, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

J. C. Avery for appellant.

David Hays for respondent.

Agree to affirm on authority of *Mandeville v. Avery* (124 N. Y. 376).

All concur.

Judgment affirmed. _____

OLIVER M. KEMP, as Executor, etc., Appellant, *v.* THE GOOD
TEMPLARS' MUTUAL BENEFIT ASSOCIATION, Respondent.

(Argued October 13, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1892, which denied a motion for a new trial and ordered judgment for defendant upon verdict directed at Circuit.

Clarence A. Farnum for appellant.

R. E. White for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

In the Matter of the Probate of the Last Will and Testament
of JOHN HENRY FRICKE, Deceased.

(Submitted October 14, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 3, 1892, which affirmed a decree of the surrogate of the county of New York admitting to probate the last will and testament of John Henry Fricke, deceased.

Horace Graves for appellants.

Willard Parker Butler and *Charles B. Reid* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ANNIE BARRETT, an Infant, etc., Appellant, v. GEORGE WALDO
SMITH et al., Respondents.

(Argued June 17, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 4, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Richard O'Gorman for appellant.

James A. Seaman for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. WILLIAM K. CHURCHYARD, Respondent,
v. THE BOARD OF COUNCILMEN OF THE CITY OF BUFFALO,
Appellant.

THE PEOPLE ex rel. FRANK J. IHLIG, Respondent, v. THE
SAME, Appellant.

(Argued October 17, 1892; decided October 28, 1892.)

APPEAL from orders of the General Term of the Superior Court of Buffalo, made July 20, 1892, which directed a peremptory writ of mandamus to issue requiring defendants to approve of certain warrants drawn in favor of the relators in payment of salary as police commissioners of the city of Buffalo.

Philip A. Laing for appellant.

Frank C. Laughlin for respondent.

Agree to affirm; on opinion of HATCH, J., below.

All concur.

Orders affirmed.

EVELYN T. PROVOST, Respondent, v. WILLIAM Y. PROVOST,
Appellant.

(Argued October 17, 1892; decided October 28, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department made February 10, 1892, which affirmed an order of Special Term denying a motion by defendant to vacate and set aside a judgment in favor of plaintiff.

George A. Stearns for appellant.

David Provost for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

JOHN T. UNDERWOOD, Respondents, *v.* STEPHEN T. SMITH,
Appellant.

(Argued October 17, 1892; decided October 28, 1892.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made June 10, 1892, which affirmed an order of Special Term granting an injunction *pendente lite*.

Philo Safford for appellant.

Charles Strauss for respondent.

Agree to affirm; on opinion of BOOKSTAVEN, J., below.

All concur.

Order affirmed.

In the Application to Compel the Final Settlement of JAMES
NEALE PLUMB as Guardian, etc.

Under the Code of Civil Procedure (§ 2538) a Surrogate's Court has power in its discretion, to grant an order directing the issuing of a commission to examine before trial a party to a proceeding pending before it.

(Argued October 17, 1892; decided October 28, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made May 13, 1892, which affirmed an order of the surrogate of New York county, directing a commission to issue to examine respondent as a witness in her own behalf upon objection to her guardian's account.

The following is the opinion in full:

"We think there was no abuse of discretion in granting the order appealed from, such as would enable this court to review the decisions of the surrogate and of the General Term of the Supreme Court on that ground. A question is made that in such a proceeding as this the surrogate had no power to grant the order for a commission.

"For the reasons stated in the opinion of Judge O'BRIEN at the General Term in this proceeding, we think the surro-

gate, under section 2538 of the Code of Civil Procedure, had such power.

"The power existing and there being no abuse of discretion, no appeal lies to this court from the order for such commission and the appeal must therefore be dismissed, with costs.

Henry Thompson for appellant.

David McClure for respondent.

Per Curiam opinion for dismissal of appeal.

All concur.

Appeal dismissed. _____

ALICE CROCKER et al., Respondents, v. ERVIN G. GOLLNER et al., Impleaded, etc., Appellants.

The court has power on motion to relieve a purchaser on sale under judgment in a foreclosure suit, and where facts are shown sufficient to call upon the court to exercise its discretion, its determination is not reviewable here.

(Argued October 17, 1892; decided October 28, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 22, 1892, which affirmed an order of the Special Term denying a motion to compel a purchaser at a foreclosure sale to complete his purchase, and releasing the purchaser from his purchase.

The following is the opinion in full:

"Appeal from an order of the General Term, which affirmed an order denying a motion to compel the purchaser at the sale in foreclosure to complete his purchase, and relieving him from his bid. The motion was made by the defendants, who were the mortgagors. Assuming that they had an interest in the sale, which would give them a standing in court to insist upon such a motion, a fact about which some doubt fairly exists, in view of a general release executed by them, after the mortgage sale, to the purchaser, this court will not review the order they complain of. In the affidavits submitted in opposition to their motion, there appeared facts which, while not perhaps exhibiting an imperfect title, still were sufficient

in their nature, and as, in part, occurring after the judgment of sale in foreclosure, to move the court to relieve the purchaser from his agreement to take the property bid off.

"The court had the undoubted power to control the proceedings in the foreclosure action, and, with all the facts before it upon which its action was invoked in behalf of each party, the motion of the defendants was denied, and the purchaser was relieved from going on with his agreement. It was a matter resting in its discretion, and we will not review its action here.

"The appeal should be dismissed, with costs."

Alfred R. Page for appellants.

William C. Beecher and *Brewster Kissam* for respondents.

GRAY, J., reads for dismissal of appeal.

All concur.

Appeal dismissed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
FRANK MCCORMICK, Appellant.

Where a defendant in a criminal action offers himself as a witness, he is subject to the same rules of examination as apply to other witnesses. Upon trial of an indictment for murder, the defendant was called as a witness in his own behalf. Upon cross-examination, he was asked if he did not, at a time and place specified, draw a pistol upon two persons and threaten to shoot them. This was objected to, and objection overruled. *Held*, no error; that the evidence was competent as affecting the credibility of the witness.

(Argued October 17, 1892; decided October 28, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, entered upon an order made at the June term, 1892, which affirmed a judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting defendant of the crime of manslaughter in the first degree.

The following is the opinion in full:

"The defendant was indicted in the General Sessions of the city and county of New York, for murder in the first degree,

and was upon his trial convicted of manslaughter in the first degree. After the verdict and before judgment thereon he moved for a new trial which was denied. After the entry of the judgment he appealed therefrom to the General Term of the Supreme Court where his conviction was affirmed and then he appealed to this court. The appeal brings before us only questions of law raised by exceptions taken upon the trial to the rulings of the trial judge. (Code of Criminal Procedure, § 519.)

"Our attention is called to but one exception and that was taken to the ruling of the trial judge overruling defendant's objection to the following question: 'Is it not a fact that in the month of September, 1890, two months or about prior to Gillespie's death, in a saloon known as the Manhattan, in Chatham square, that you drew a pistol on two disreputable women and threatened to shoot them, and didn't Rowe the bartender draw a revolver and pointing it at you did he not say, drop that pistol or I will blow your damned brains out?' The defendant had been examined as a witness on his own behalf, and this question was put to him by the prosecution on his cross-examination. The defendant having made himself a witness was subject to the same rules of examination as any other witness, and the question was competent to effect his credibility. (*People v. Casey*, 72 N. Y. 393; *People v. Irving*, 95 id. 541.)

"The judgment should be affirmed."

Seaman Miller for appellant.

Henry D. P. Stapler for respondent.

EARL, Ch. J., reads for affirmance.

All concur.

Judgment affirmed.

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ABATEMENT AND REVIVAL.

An executor of an assignee for benefit of creditors is not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee, unless the executor has been substituted as assignee.
Steinhouser v. Mason. 635

ACKNOWLEDGMENT OF WRITTEN INSTRUMENT.

1. The provision of the Code of Civil Procedure (§ 986), which declares that the certificate of acknowledgment of a conveyance is not conclusive and may be rebutted and its effect contested by one affected thereby, cannot be invoked to prevent the operation of an estoppel by deed. *Mut. L. Ins. Co. v. Corey.* 326
2. Where the owner executes a deed of real property and delivers the same, with a certificate thereon of an officer authorized by law to take acknowledgments, of the grantor's appearance before him at a place within his jurisdiction and of an acknowledgment by said grantor, of its execution, neither the latter nor one claiming title under a subsequent conveyance by him, can subsequently allege the falsity of the certificate or its invalidity, even upon a jurisdictional ground, for the purpose of impairing the estate of the grantee. *Id.*
3. In an action to set aside a deed as a cloud on title, both parties claimed by purchase from the same grantor. Defendants' deed, which was the prior one, was perfect and valid upon its face. Upon it was a certificate of acknowledgment in the usual form signed by a notary public in and for the county of S.; the venue of the certificate was laid in that county

and its county clerk authenticated in due form the official character of the notary. The deed was recorded in the county of T. where the land was situated and where the grantor lived. It appeared that the deed was in fact executed and acknowledged at the grantor's residence in the county of T.; it was executed for a good consideration, and there was no evidence that the grantor was the victim of any fraud, imposition, or duress. *Held*, that plaintiff was estopped as against defendants from claiming that the deed was not duly acknowledged. *Id.*

ADMISSIONS AND DECLARATIONS.

An allegation contained in an answer which has no reference to and does not admit any allegation of the complaint, is not a conclusive admission, and the defendant is not estopped thereby from proving a fact inconsistent with the allegation. *Ferris v. Hard.* 354

ADVERSE POSSESSION.

In proceedings to lay out a street, commenced by the trustees of a village, it appeared that the landowners had acquired title under deeds which recognized as a street the land sought to be acquired as laid out upon a map made by a former owner, who sold and conveyed by descriptions referring to said map, and that they had conveyed lots to different parties, by descriptions referring to that map and bounding the lots by said street as laid out on said map. The contesting landowners had fenced in, planted and adorned the strip, and one of them had a house upon it; they claimed that the easement was extinguished by adverse possession.

sion. *Held*, that an adverse possession could not be founded upon these acts, because of the presumption flowing from the acceptance by them of their deeds and from the conveyances made by them, that they entered in subordination to the servitude imposed, and occupied only temporarily until the use of the easement should be required. *In re Village of Olean v. Steyner*. 341

ALBANY (CITY OF).

1. Under and by the act of 1862 (Chap. 283, Laws of 1862), authorizing the W. T. Co. to construct a street railroad, and operate the same by any mechanical or other power except steam, and giving power to the common council of the city of Albany to impose such restrictions as, in its judgment the interests of the public require, that body is not bound by the limitations first imposed, but the authority is coincident with the company's right of selection. *Hudson River Telephone Co. v. Waterloot Tpke. Co.* 893
2. Accordingly *held*, that said company having obtained the consent of the common council of the city of Albany, was authorized to adopt and use what is known as the single-trolley system of electrical propulsion, it appearing and having been found that it is the best system thus far devised, and is not prejudicial to public health, or dangerous. *Id.*

ANIMALS.

1. A vicious domestic animal, if permitted to run at large, is a nuisance, and a person who, knowing its vicious character, keeps or harbors it is liable for all damages directly resulting from it. *Quilty v. Battie*. 201
2. In an action against a husband and wife to recover damages for injuries occasioned by the bite of a dog, it appeared that the husband was the owner of the dog, but kept it upon premises owned by the wife, upon which they

both resided, she paying the expenses of the household; she knew of the vicious propensities of the dog, but permitted it upon the premises, feeding and caring for it. There was no evidence that the husband had other property upon the premises; that he was in possession as her tenant and had the care and management of his wife's property; that he assumed to direct as to the domestic animals to be kept on the place or that he knew of the vicious propensities of the dog, and he was sought to be held liable solely on the ground of his marital liability for the torts of his wife. *Held*, that the wife was properly held liable; but that a judgment against the husband was error. *Id.*

APPEAL.

1. Where, upon appeal in an action tried by the court or a referee, no case is made containing the evidence, but the appeal is based solely upon exceptions contained in the judgment-roll, and the findings of fact do not sustain the conclusions of law, it may not be assumed that there was evidence justifying other findings which would sustain the conclusions; on the contrary, it is to be assumed that there was no such evidence, and when the conclusions of law have been properly excepted to, the judgment may not be sustained. *Rochester L. Co. v. Stiles & P. P. Co.* 209
2. The party succeeding should see to it that he has findings of fact sufficient to uphold his judgment, and if he does not he is exposed to the perils of a reversal by an appeal based solely upon exceptions to the legal conclusions. *Id.*
3. Under the provision of the Code of Civil Procedure (§ 2576), providing for appeals from surrogates' decrees, an appellant desiring a review upon the facts is not required to so specifically state in his notice of appeal. The grounds of the appeal are not required to be stated, and a notice that the appeal is "from the decree, and each and every part thereof," is sufficient to au-

- thorize such a review. *In re Stewart*. 418
4. Said section was intended to declare affirmatively the power of the General Term to review both the facts and the law on appeals from surrogates' decrees, not to regulate the practice in bringing such appeals, except to require that, when the appeal is from a decree rendered on trial of an issue of fact, a case must be made and settled, as on an appeal in an action. *Id.*
5. The rule that in an action tried by a jury, a motion for a new trial is necessary to review the facts, is not applicable to a trial before a surrogate. *Id.*
8. Where the record on appeal in an action tried by a referee contained none of the evidence, but simply so far as proofs were concerned the referee's findings of fact. *Held*, it was to be assumed that all the evidence upon which the findings were based was received without objection; and that the question as to the competency of the evidence under the pleadings was waived, and so, it could not be considered here. *Niebuhr v. Schreyer*. 614
7. In an action to rescind a contract for the purchase of real estate and to recover \$200 purchase money paid, and \$208.51 expenses of search and disbursements, the complaint also alleged that plaintiff was by the terms of the contract to receive the rent of the premises from June 1st to 15th and without alleging the amount thereof asked to recover the same. The judgment was for defendant. *Held*, that the amount involved was less than \$500, and so the judgment was not reviewable here; that as plaintiff sought to rescind the contract he could not at the same time claim the rent of the premises he would have been entitled to had he performed it. *Miele v. Deperino*. 618
8. Where a claim has been wholly rejected by the Board of Claims, to sustain an appeal, the right to recover some sum must so conclusively appear as to raise a question of law, or there must have been some material and erroneous ruling adverse to the claimant. *Spencer v. State*. 619
9. In pursuance of a stipulation which recited that an undertaking given on appeal to this court had been canceled, an order was entered which gave plaintiff leave to file another "undertaking to perfect the appeal" within five days, and provided that the new undertaking should have when filed the same force and effect as if it had been filed and served when the first undertaking was given, and that if not filed as specified, the appeal should be dismissed. A new undertaking not having been filed, the appeal was dismissed. Another appeal was thereafter taken and perfected. On motion to strike the case from the calendar, *held*, that the case was placed by the stipulation and order on the same footing as if no undertaking had been given, and the appellant had the right, within the statutory time for appealing, to take and perfect another appeal. *Culliford v. Gadd*. 632
10. The court has power on motion to relieve a purchaser on sale under judgment in a foreclosure suit, and where facts are shown sufficient to call upon the court to exercise its discretion, its determination is not reviewable here. *Crocker v. Gollner*. 662
- APPORTIONMENT (OF MEMBERS OF ASSEMBLY).
- See* LEGISLATURE.
- ASSEMBLY.
- See* LEGISLATURE.
- ASSESSMENT AND TAXATION.
1. As a general rule all property within this state is liable to taxation, and to sustain a claim of exemption the claimant must point out some statute clearly giving it. *People ex rel. v. Coleman*. 231

2. The provision of the Revised Statutes (1 R. S. 888, § 4, subd. 71) exempting "the personal estate of every incorporated company not made liable to taxation on its capital" includes only corporations having a capital, which is not liable to taxation as such; it does not embrace corporations having no capital. *Id.*
3. A corporation organized under the laws of another state having property in this state can claim no exemption from taxation on account of the laws of its own state. *Id.*
4. While *it seems* the legislature may constitutionally impose double taxation, its purpose so to do may never be inferred, but must plainly appear. *Id.*
5. As to whether depositors in savings banks are taxable upon their deposits, *quære*. (EARL, Ch. J., and FINCH, J., holding that they are.) *Id.*
6. As to whether the act of 1882 (Chap. 402, Laws of 1882), repealing the provision of the act of 1875 (§ 56, chap. 371, Laws of 1875), which repealed the provision of the acts of 1866 (§ 7, chap. 761, Laws of 1866), providing for the taxation of banks on their "privileges and franchises," and also repealed the act of 1867 (Chap. 861, Laws of 1867), amending the same, restored said provision, *quære*. *Id.*
7. Said provision, if in force, has no application to foreign savings banks. *Id.*
8. The only exemption such a bank can claim is under the act of 1857 (Chap. 456, Laws of 1857), which exempts deposits due depositors but not its surplus. *Id.*
9. A foreign savings bank is, therefore, liable to taxation upon its surplus invested in this state. *Id.*
10. Accordingly *held*, where a savings bank of another state had invested a portion of its surplus in the purchase of stock of a bank in this state, that it was liable to assessment and taxation upon the value of the shares of said bank at the place where the bank is located (§ 312, chap. 409, Laws of 1882); proper deductions being made for the liabilities of the savings bank. *Id.*
11. Where assessors, in making an assessment of personal property, ascertain the amount of the owner's liabilities and make all deductions on account thereof to which he is entitled and assess him for the balance, he may not claim against the assessment so made another deduction of liabilities. *Id.*
12. The act of 1880 (Chap. 269, Laws of 1880), "to provide for the review and correction of illegal, erroneous or unequal assessments," regulates the review of assessments in towns, cities and villages by certiorari, and renders inapplicable to such cases the general provisions of the Code of Civil Procedure (§§ 2127 *et seq.*) relating to the writ; under said act, if a case is brought within it, the granting of the writ is not discretionary, but the petitioner is entitled to it as a matter of right. *In re Corwin*. 245
13. The time allowed by said act (§ 9) within which a party seeking to review an assessment may apply for a certiorari, *i. e.*, fifteen days after notice of the final completion, verification and delivery of the roll, may not be abridged by any action or omission to act upon the part of assessors or the common council of a city. *Id.*
14. Where no such notice has been given, the time within which application for the writ may be made is unlimited. *Id.*
15. The petition, on application, under said act, for a certiorari to review an assessment, is in the nature of a pleading, and only conclusions of fact need be stated; not the evidence necessary to support them. *Id.*
16. The charter of the city of Middletown (§ 5, tit. 4, chap. 535, Laws of 1888) requires the assess-

ors to make up the assessment-roll, give notice of the meeting for hearing of grievances, correct the roll and deliver it to the city clerk on or before the third Tuesday of July. Upon an application, under said act of 1880, for a certiorari to review the action of the assessors of said city in assessing the property of the relator for the year 1891, it appeared that, on June eighteenth, they gave notice that they had completed the roll and left a copy of it with the city clerk where it could be examined until July tenth, when they would meet to review the assessments on application of anyone aggrieved. The assessors met on July tenth, heard complaints, and on July sixteenth swore to the roll and filed it with the city clerk; on the same day the common council adopted a resolution confirming it. It did not appear that any notice of the final completion and delivery of the roll was given. *Held*, that the relator was not concluded by the action of the common council; and that, in the absence of notice, the time for applying for the writ was unlimited. *Id.*

17. *People ex rel. v. Assessors of Niagara* (40 Hun, 228), so far as it may be construed to hold that the writ cannot issue in any case after the assessors have parted with the roll, disapproved. *Id.*

18. The General Term quashed the writ on the ground that the relator appeared, on the day appointed for hearing of grievances, by attorney, and not in person. No such objection was made by the assessors; they received and filed the attorney's affidavits, interrogated him in reference to the grievance complained of, took an admission from him which rendered the examination of the relator unnecessary, and gave the attorney notice of their final action. *Held*, that the decision was error. *Id.*

19. The grievance complained of was that the assessment of the relator's personal property was unequal; the petition alleged that all the other assessments upon the roll were made at a lower propor-

tionate valuation than the assessment of relator's property; that his assessment was wholly out of proportion to the basis of valuation adopted by the assessors in making other assessments, and did not conform to the valuations and assessments applied by them to other personal property. The relief sought was that the assessment be corrected so as to conform to the valuations of other personal property, and so as to secure equality of assessment. *Held*, that the petition was sufficient. *Id.*

20. Plaintiff had contracted to sell property upon which an assessment was imposed by defendant for a local improvement. The receiver of taxes published a notice and demanded payment, notifying plaintiff that the property would be sold unless the assessment was paid. Upon return to the warrant that the assessment was unpaid, defendant's board of trustees passed a resolution directing its treasurer to advertise and sell. Plaintiff then asked to be allowed to deposit with the vendee sufficient to cover the amount of such assessment, until a determination of the proceedings taken to test its legality. Said trustees refused this request or to make any arrangement to delay the sale. Plaintiff then paid the assessment at the same time serving notice that she paid under protest and reserved her right to sue for and recover the same. In an action brought to vacate said assessment and to recover the amount paid the illegality of the assessment was conceded. *Held*, that such payment was involuntary, it having been made under circumstances amounting to coercion at law; and that plaintiff, having established the invalidity of the assessment, was entitled to recover back the money paid. *Vaughn v. Village of Portchester.* 460

21. Under the New York Consolidation Act (§§ 879, 903, chap. 410, Laws of 1882) an assessment for a local improvement in said city can only be vacated or modified, through the affirmative action of the landowner, by resort to the

special remedy therein provided; and this, although the assessment is void. *People ex rel. v. Martin*.

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22. Accordingly *held*, that a certiorari did not lie to review the action of the board of revision and correction of assessment lists in confirming an assessment. *Id.*

23. Where securities belonging to a trust fund were in the possession of three trustees, jointly in another state, two of the trustees being residents of that state, and the other of this state, *held*, that they were not taxable in this state under the act of 1883 (Chap. 392, Laws of 1883), declaring that "all debts and obligations for the payment of money due or owing to persons residing within the state, * * * wherever said securities shall be held, shall be deemed for the purposes of taxation personal property within this state, and shall be assessed as such to the owner or owners." *People ex rel. v. Barker*.

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24. Also *held*, that the question was not affected by the fact that such securities were bonds secured by mortgages upon lands in this state.

Id.

—Where commissioners have jurisdiction to make an assessment and act upon due notice to party assessed, and he has an opportunity to review the assessment, the conclusive presumption in an independent action is that assessment was fair.

See Garrett v. Trustees, etc.

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ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. Where no right of set-off exists when an assignment by an insolvent debtor for the benefit of creditors is made, it cannot arise afterwards in favor of one indebted to the insolvent estate who is also a creditor. *Fera v. Wickham*.

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2. Where therefore, among the assets transferred by such an assignment, was a demand against one who at the time the assignment was made held a demand against the assignor

which had not then matured, *held*, that he was not entitled to a set-off; and this, although his claim against the estate matured before that against him. *Id.*

3. In an action brought by judgment creditors to set aside an assignment made by the firm of H. H. & Co. for the benefit of creditors as fraudulent and void, and to procure the application of moneys paid to certain defendants, in pursuance of a preference therein, to the satisfaction of plaintiffs' judgment, it appeared that prior to February 1, 1882, the then existing firm of H. H. & Co. owed the estate of M. a debt upon which it was paying interest. The firm was then insolvent. On that date a new firm was formed with the same name, one B. becoming a partner. The latter knew of the existence of the debt, but not the amount thereof, and he made no inquiry; he contributed no capital, and the new firm had none except the stock and assets of the old firm, and the business was conducted after he became a member precisely as before. The debt to the estate was credited to the executors on the books of the new firm; they were subsequently credited with interest accruing, charged with goods and money paid, and statements of the account were rendered to them. M. testified that his intention, when he went into the firm, was "to take the affairs of the old firm as he found them, and go on with them as a member of the new firm." In 1884 the assignment was executed, B. joining therein, in which the debt to the estate was preferred. He made no defense to an action brought by the executors against him and the other members of the firm to recover the debt as a firm debt, and they obtained judgment therein. Plaintiffs' debts accrued subsequent to B.'s becoming a member of the firm. *Held*, that the stock and property of the old firm at the time B. became a member was subject to the equitable lien of the then existing creditors of the firm; that it was inferable from the circumstances that the new firm had assumed the debt to the estate,

and, therefore, had a right to treat it as a debt of the firm, and so, it was properly preferred. *Peyser v. Myers*. 599

4. The assignment directed the payment of and the assignee paid \$102,827 to defendants; in making up the account the interest was compounded. The debt owing to the estate at the time of the assignment with simple interest was \$82,649. The assignors in fixing the amount, the assignee in paying and defendants in receiving it acted in good faith. In a prior action brought by another creditor the court decided the preference to the extent of \$20,228 was invalid, and directed the executors to restore that amount, which was done by them. *Held*, that in the absence of any fraudulent intent, the payment was valid and would be protected, to the extent of the actual debt. *Id.*
5. In fixing the actual debt at \$82,649 the interest was computed on the principal to such time as the payments equalled or exceeded the interest, and then by deducting the payments from the aggregate of principal and interest, a new principal was ascertained. *Held*, a proper method of computation. *Id.*
6. An executor of an assignee for the benefit of creditors is not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee, unless the executor has been substituted as assignee. *Steinhouser v. Mason*. 635

ATTORNEY AND CLIENT.

—An attorney cannot collect for services alleged to have been rendered for a party to an action when he appeared in the action for another party whose interests were antagonistic to his alleged client's.

See Thorn v. Beard (Mem.). 648

—When evidence insufficient to show employment of, or rendition of services by, an attorney for an alleged client. *Id.*

BANKS AND BANKING.

1. As to whether depositors in savings banks are taxable upon their deposits, *quere*. (EARL, Ch. J., and FINCH, J., holding that they are.) *People ex rel. v. Coleman*. 281
2. As to whether the act of 1882 (Chap. 402, Laws of 1882), repealing the provision of the act of 1875 (§ 56, chap. 871, Laws of 1875), which repealed the provision of the acts of 1866 (§ 7, chap. 761, Laws of 1866), providing for the taxation of banks on their "privileges and franchises," and also repealed the act of 1867 (Chap. 861, Laws of 1867), amending the same, restored said provision, *quere*. *Id.*
3. Said provision, if in force, has no application to foreign savings banks. *Id.*
4. The only exemption such a bank can claim is under the act of 1857 (Chap. 456, Laws of 1857), which exempts deposits due depositors, but not its surplus. *Id.*
5. A foreign savings bank is, therefore, liable to taxation upon its surplus invested in this state. *Id.*
6. Accordingly *held*, where a savings bank of another state had invested a portion of its surplus in the purchase of stock of a bank in this state, that it was liable to assessment and taxation upon the value of the shares of said bank at the place where the bank is located (§ 312, chap. 400, Laws of 1882); proper deductions being made for the liabilities of the savings bank. *Id.*
7. Payment by a savings bank of a deposit to a person not entitled to receive it, though he may have possessions of the bank book and present it, will not discharge the bank, if at the time of payment a fact or circumstance was brought to the knowledge of the bank officers, calculated to excite the suspicions of and inquiry by an ordinarily careful person, and they failed to make inquiry or to exercise at least ordinary care and

diligence. *Gearns v. Bowery Savings Bank.* 557

8. In an action by plaintiff, as administrator of the estate of M., to recover the balance of a deposit account with defendant, as such administrator, the latter pleaded payment, and proved that said balance had been paid to one K., a person unknown to defendant's officers, upon presentation by him of the pass book, together with a paper purporting to be a power of attorney, executed by plaintiff in his individual capacity, wherein he was described as executor of the will of P., and which although it gave the correct number of the pass book, by its terms authorized K. to draw all moneys on deposit with defendant credited to plaintiff as such executor. It appeared that K. obtained possession of the pass book and procured plaintiff's signature to the power of attorney by fraud. Plaintiff's counsel requested the submission to the jury of the question as to whether defendant acted with ordinary care and diligence in making such payment which was refused. *Held*, error; that as the alleged power of attorney, upon its face, did not relate to the deposit in question, and conferred no power upon K. to draw the money or upon defendant to pay it to him, this might furnish reasonable grounds for suspicion and, under the circumstances, the question of defendant's negligence should have been submitted to the jury. *Id.*

BOARD OF CLAIMS.

1. The legislature has the right to enlarge the time within which a claim against it may be filed, provided the claim is between citizens would not already be outlawed. *Parmenter v. State.* 154
2. The claimant in 1876 entered into a contract with the state to do certain printing of a public nature for two legislative sessions for \$47,500 each session. Attached to the contract was an alternative bid which had been made by claimant giving specified prices for each piece of work. The contract con-

tained this provision "in the event of an extra session the said work shall be done and materials furnished for the prices stated in the alternative bid annexed, and the same prices shall also be paid for any work and materials ordered not for the use of the legislature." Upon a claim for work ordered by the legislature during the two sessions, but not for its use, *held*, that this work was not included in the gross sum, but claimant was entitled to payment therefor at the prices specified in the bid annexed; that the words "not for the use of the legislature" were not limited to work ordered at an extra session. *Id.*

3. The claim was presented under the special act of 1888 (Chap. 541, Laws of 1888), authorizing the Board of Claims to hear, audit and determine it. Claimant filed no claim with the board of audit, nor did he file any claim with the Board of Claims within the time limited by the act of 1884 (Chap. 60, Laws of 1884), for the filing of claims with the latter board which were formerly cognizable by the board of audit, *i. e.*, July 1, 1884. *Held*, that said act of 1888, was a valid exercise of legislative power, and gave the Board of Claims jurisdiction to determine as to the validity of the claim; that it was not violative of the constitutional provision (Art. 7, § 14) prohibiting the auditing or payment of any claim against the state "which, as between citizens of the state, would be barred by the lapse of time;" that construing said provision as meaning the general laws limiting the rights of citizens to commence similar actions, six years had not elapsed from the time the claim accrued up to July 1, 1884, when the right to file his claim was taken away; and so, as he had not had that time in which to commence his action, the claim as between citizens would not be outlawed. *Id.*
4. Also *held*, that, as the act organizing the Board of Claims (Chap. 205, Laws of 1883) gave no power to file the claim before that board, its jurisdiction being limited to claims accruing within two years

prior to the filing of the claim, it only left him the time which elapsed between its passage and May 31, 1883 (about eight weeks), the time limited in which to file it with the board of audit, and thus have the benefit of a transfer to the Board of Claims, and that this, as between citizens, did not give a reasonable time. *Id.*

5. Also *held*, that the act of 1884, by which a few days over three months was allowed to a claimant in which to file his claim, did not provide a reasonable time. *Id.*

6. Also *held*, that the Board of Claims had power to allow and was justified in allowing interest. *Id.*

7. It appeared that while no steps were taken by claimant toward filing and presenting his claim until subsequent to the passage of the act of 1888, for most of the period he was engaged in trying to collect it by mandamus proceedings against the state comptroller, and that much of the delay in the prosecution thereof was caused by the nonaction of the courts, which the claimant was powerless to prevent. *Held*, that the claim could not be characterized as stale. *Id.*

8. Where a claim has been wholly rejected by the Board of Claims, to sustain an appeal, the right to recover some sum must so conclusively appear as to raise a question of law, or there must have been some material and erroneous ruling adverse to the claimant. *Spencer v. State.* 619

9. Upon the hearing of a claim for damages to a farm by the overflow of a creek alleged to have been caused by water, which escaped through a defective dam built by the state across said creek, but which the state claimed was caused by freshets, the state was allowed to prove under objection and exception that obstructions created by bridges and railroad embankments below said farm hindered the discharge of the waters of said creek. *Held*, no error; that such evidence was relevant in considering the effect of freshets and their ten-

dency to produce an overflow. *Id.*

BONA FIDE PURCHASER.

One who acquires title to valuable property for a merely nominal money consideration, although actually paid, but under circumstances indicating a gift or advancement, is not within the meaning of the Recording Act (1 R. S. 756, § 1) "a purchaser for a valuable consideration," and his deed, although recorded, conveys no title as against a prior unrecorded conveyance of the same property. The consideration must not only be good, but valuable, in the sense that a fair equivalent is given for the property granted, in order to constitute the grantee a purchaser for value. *Ten Eyck v. Witbeck.* 40

BUFFALO (CITY OF).

1. The act of 1886 (Chap. 572, Laws of 1886), requiring actions against "the mayor, aldermen and commonalty of any city" having fifty thousand inhabitants or over, for damages for personal injuries arising from its alleged negligence, to be commenced within one year after the cause of action accrued, and notice of the intention to commence such action and of the time and place at which the injuries were received, to be filed with the counsel to the corporation within six months after such cause of action shall have accrued, is not limited to a city having as its corporate name "the mayor, aldermen and commonalty," but applies to all cities of the prescribed size, and is imperative. *Curry v. City of Buffalo.* 366

2. The fact that a city charter requires that claims for such damages shall be presented to the common council for its consideration does not excuse a non-compliance with said act of 1886; the two requirements are not inconsistent. *Id.*

3. Where, therefore, in an action against the city of Buffalo to re-

cover such damages, a compliance with said act of 1886 was not shown, *held*, that plaintiff was properly nonsuited; that a compliance with a provision of the city charter as it stood at the time of the commencement of the action, which was prior to its amendment in 1889 (§ 7, tit. 3, chap. 519, Laws of 1870, as amended by § 8, chap. 479, Laws of 1886), did not excuse the failure to give the notice required by said act of 1886. *Id.*

CALENDAR.

1. The provision of the Code of Civil Procedure (§ 791) which specifies as one of the causes entitled to a preference "a cause entitled to a preference by the general rules of practice" (sub. 10, § 791) does not apply to this court (§ 3347). *Nichols v. Scranton S. Co.* 634
2. To obtain a preference upon the calendar of this court, in a case not designated by said Code or the rules of the court, the application must be addressed to the discretion of the court, upon a showing of such facts as may be deemed to render a preference proper in the interests of justice. *Id.*
3. Upon motion for a preference the sole facts relied upon were that certain certificates of stock belonging to the appellant had been levied upon by virtue of and were held under an attachment issued in the action. *Held*, this did justify the granting of the motion. *Id.*

CHARTER PARTY.

1. Defendant guaranteed the performance by one McK. of a contract contained in a charter party, under which he hired a propeller from the W. S. Co., for one year from October 17, 1884, to be used in southern waters. McK. agreed to insure the vessel for one year for a certain amount, and assumed "all fire, marine and other risk of damage that may happen to said vessel, * * * which is not covered by fire and marine insurance," so provided for. McK. procured the insurance as agreed.

Subsequent to October 17, 1885, the vessel was burned at sea. In an action upon the guaranty *held*, that the risks assumed by McK. were only such as were not covered by the insurance which he agreed to and did procure, and were limited to the period included in the charter party, and so, no liability was incurred by him or by defendant under said clause of the instrument. *Young v. Leary.* 569

2. By the charter party McK. agreed, on termination of the charter, to deliver the vessel to the company in New York harbor. *Held*, that to this agreement a condition was implied of the continued existence of the vessel, and in case it was destroyed without fault of McK. before breach of the agreement, so that delivery was impossible, he was excused therefrom. *Id.*
3. But *held*, that as McK. failed to deliver the vessel at the end of the term if the failure was not excused, there was a breach of the agreement, and the subsequent destruction of the vessel without his fault furnished no excuse for such breach. *Id.*
4. Defendant claimed that the obligation to deliver by October 17, 1885, was waived. It appeared that sometime prior to the expiration of the year, while the vessel was in southern waters, negotiations were in progress between the parties, in which defendant participated, for the purchase of the vessel by McK., and that during such negotiations the time for the delivery passed. Subsequent to that time terms of sale were agreed upon and a mortgage was sent to McK., to execute as security for part of the purchase price. These negotiations were finally abandoned, and thereupon the vessel was sent north to be delivered, and was burned while on the way. The referee substantially found that there was a waiver of punctual delivery at the end of the term occasioned by delay in the negotiations for a purchase, but decided that such waiver was not material, as defendant, although a surety, was a party

to the transactions causing the delay. *Held*, error; that if there were such a waiver and the time for delivery impliedly extended until a reasonable time after failure of the negotiations, and if during such extended time the loss occurred without the fault of McK., there was no breach of the agreement on his part, and so no liability of defendant as his surety. *Id.*

CANANDAIGUA (VILLAGE OF).

1. Under the provisions of the act of 1886 (Chap. 658, Laws of 1886) authorizing the trustees of the village of Canandaigua to construct a public sewer along the bed of the outlet of Canandaigua lake, the plan and details of the work were left to the judgment and discretion of the trustees, and although the plan adopted was faulty and a better one might have been devised they may not be made responsible for the results. *Garrett v. Trustees, etc.* 436

2. So, also, where it turns out that a person assessed for benefits was not in fact benefited as much as was anticipated, this does not give him a cause of action against the trustees. *Id.*

3. As the commissioners appointed under said act had jurisdiction to make the assessments and a person assessed was given an opportunity for a hearing before them, and also to review the assessments, the conclusive presumption in an independent action is that the assessment was fair and based upon a proper adjustment of the benefits conferred and the burdens imposed; at least where it is not claimed that the improvement was not in some degree beneficial to the property of such person. *Id.*

4. The trustees in prosecuting the work caused to be erected gates by which to regulate the flow of water from the lake. In an action, among other things, to compel said trustees to so use the gates as to diminish the flow of water through the same and to prevent its overflow on plaintiff's land, it

did not appear that more water was allowed to pass through the outlet from the lake since, than before the improvement, or that the improvement or the use of the gates increased the flow of water on plaintiff's land, but simply that the improvement did not have the anticipated effect of completely draining overflowed lands. *Held*, that in the absence of any evidence that defendant had neglected any duty, either in the construction of the gates or the manner of operating them, or had done any unlawful act, the action was not maintainable; that the regulation of the quantity of water passing through the gates was committed, in a great measure, to the discretion of the trustees, and they were under no legal obligation to favor the plaintiff. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

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- Kellogg v. Thompson* (66 N. Y. 88), distinguished. *R. L. Co. v. S. & P. P. Co.* 214
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- Fera v. Wickham* (61 Hun. 343), reversed. *Fera v. Wickham.* 223
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- Rothschild v. Mack* (115 N. Y. 1), distinguished and explained. *Fera v. Wickham.* 225
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- Lindsay v. Jackson* (2 Paige, 581), distinguished and explained. *Fera v. Wickham.* 227
- Chance v. Isaacs* (5 N. Y. 592), distinguished and explained. *Fera v. Wickham.* 227
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United States v. Rauscher (119 U. S. 407), distinguished. *People ex rel. v. Cross.* 536

Phelan v. A. M. L. Ins. Co. (113 N. Y. 147), distinguished. *McDougall v. Prov. Sav. Life Assurance Soc.* 556.

In re Vowner (113 N. Y. 569), distinguished. *Bradhurst v. Field.* 568

Harmony v. Bingham (12 N. Y. 99), distinguished. *Young v. Leary.* 576

CAUSE OF ACTION.

Public officers or a municipality charged with the conduct of a work of public improvement, where they have acted in good faith and are not chargeable with any neglect, default or unlawful act, are not responsible to a property owner because the work has not resulted in such benefits to him as were anticipated, or because it does not answer all the purposes for which it was projected. *Garrett v. Trustees, etc.* 486

See CONTRACT.

COVENANTS.

CREDITOR'S SUIT.

NEGLECTENCE.

SPECIFIC PERFORMANCE.

TRADE-MARKS.

CERTIORARI.

1. The act of 1880 (Chap. 269, Laws of 1880), "to provide for the review and correction of illegal, erroneous or unequal assessments," regulates the review of assessments in towns, cities and villages by certiorari, and renders inapplicable to such cases the general provisions of the Code of Civil Procedure (§§ 2127 *et seq.*) relating to the writ; under said act, if a case is brought within it, the granting of the writ is not discretionary, but the petitioner is entitled to it as a matter of right. *In re Corwin.* 245
2. The time allowed by said act (§ 9) within which a party seeking to review an assessment may apply for a certiorari, *i. e.*, fifteen days after notice of the final completion, verification and delivery of the roll, may not be abridged by any action or omission to act upon the part of assessors or the common council of a city. *Id.*
3. Where no such notice has been given, the time within which application for the writ may be made is unlimited. *Id.*
4. The petition, on application, under said act, for a certiorari to review an assessment, is in the

nature of a pleading, and only conclusions of fact need be stated; not evidence necessary to support them. *Id.*

5. The charter of the city of Middletown (§ 5, tit. 4, chap. 535, Laws of 1888) requires the assessors to make up the assessment-roll, give notice of the meeting for hearing the grievances, correct the roll and deliver it to the city clerk on or before the third Tuesday of July. Upon an application, under said act of 1880, for a certiorari to review the action of the assessors of said city in assessing the property of the relator for the year 1891, it appeared that, on June eighteenth, they gave notice that they had completed the roll and left a copy of it with the city clerk where it could be examined until July tenth, when they would meet to review the assessments on application of any one aggrieved. The assessors met on July tenth, heard complaints, and on July sixteenth swore to the roll and filed it with the city clerk; on the same day the common council adopted a resolution confirming it. It did not appear that any notice of the final completion and delivery of the roll was given. *Held*, that the relator was not concluded by the action of the common council; and that, in the absence of notice, the time for applying for the writ was unlimited. *Id.*
6. The General Term quashed the writ on the ground that the relator appeared, on the day appointed for hearing of grievances, by attorney, and not in person. No such objection was made by the assessors; they received and filed the attorney's affidavits, interrogated him in reference to the grievance complained of, took an admission from him which rendered the examination of the relator unnecessary, and gave the attorney notice of their final action. *Held*, that the petition was error. *Id.*
7. The grievance complained of was that the assessment of the relator's personal property was unequal; the petition alleged that all the other assessments upon the roll

were made at a lower proportionate valuation than the assessment of relator's property; that his assessment was wholly out of proportion to the basis of valuation adopted by the assessors in making other assessment; and did not conform to the valuations and assessments applied by them to other personal property. The relief sought was that the assessment be corrected so as to conform to the valuations of other personal property, and so as to secure equality of assessment. *Held*, that the petition was sufficient. *Id.*

8. A party not the owner of adjoining uplands and having no grant of lands under the waters of a navigable river, and who, therefore, is not aggrieved by a decision of the commissioners of the land office granting said lands, is not entitled to a review by certiorari of the action of the commissioners. *People ex rel. v. Com'rs. Land Office.* 447
9. A certiorari does not lie to review the action of the board of revision and correction of assessment lists in confirming an assessment for a local improvement in the city of New York. *People ex rel. v. Myers.* 465

CHATTELS.

1. Although a growing crop of grain is in a sense a part of the real estate, it possesses characteristics of a chattel; it is salable and transferable as personal property. *Sexton v. Breece.* 387
2. The owner of a farm, upon which was a mortgage held by plaintiff, sold to defendant a crop of wheat thereon, the bill of sale giving to him the right to secure and harvest the crop. Subsequently said owner executed to plaintiff a written instrument, wherein he authorized the latter to take possession of the farm, rent the same and apply the proceeds on the mortgage. Defendant went upon the farm to cut the wheat, but was prevented from so doing by plaintiff, who harvested it, but defendant entered and carried it away. In an action of replevin, *held*, that conceding

plaintiff to be in the position of a mortgagee in possession, still defendant, as purchaser, owned the crop of wheat and had the right of ingress to gather and carry it away; and so, that the action was not maintainable. *Id.*

CODES.

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COMMISSIONERS OF LAND OFFICE.

A party not the owner of adjoining uplands and having no grant of lands under the waters of a navigable river, and who, therefore, is

not aggrieved by a decision of the commissioners of the land office granting said lands, is not entitled to a review by certiorari of the action of the commissioners. *People ex rel. v. Comrs., etc.* 447

COMMISSIONS (TO TAKE TESTIMONY). ●

See DEPOSITIONS.

CONSTITUTION.

1. A constitutional provision, which attempts to regulate the language and forms of expression to be used in legislative enactments, is not to be so construed as to embrace cases not fairly within its general purposes or policy, or the evils it was intended to correct, although they may be within its letter. *People ex rel. v. Lorillard.* 285
2. A constitutional provision is not to be so construed as to work a public mischief, unless its language is of such explicit and unequivocal import as to leave no other course open to the court, and when its intent is ascertained, that must prevail over its letter. *Id.*
3. A constitutional provision may be impliedly abrogated by the adoption of a later one, which is clearly and unquestionably antagonistic to it, although the original provision in terms remains unaltered. *People ex rel. v. Rice.* 473
4. Under the provisions of the State Constitution (Art. 3, §§ 4, 5) providing for an enumeration of the inhabitants of the state in 1855, and at the end of "every ten years thereafter," and for an alteration of the senate districts and apportionment of members of assembly at "the first session after the return of every enumeration," the power to make the alteration and apportionment is not limited to regular sessions; but when, after the adjournment of the regular session at which an enumeration bill is passed, and after an enumeration thereunder, an extraordinary session is called by the governor, and he recommends this subject for

consideration, such a session is the "first session" within the meaning of said provision, and the legislature so in session has power to make the changes and apportionment. *Id.*

5. Where the first legislature, convened at the expiration of a ten years' period, fails to perform the duty imposed upon it of directing an enumeration, the power to direct it is not lost until the recurrence of another ten years' period, but the duty devolves upon the next and each succeeding legislature until the constitutional mandate is obeyed. *Id.*
6. The amendments to the State Constitution, made in 1874, which struck out the provision denying to a colored person the right to vote, who had not the prescribed property qualification, and relieving all those not so qualified from direct taxation (Art. 2, § 1), and which omitted from the provision in reference to the apportionment of members of assembly, the clause excluding from the enumeration "persons of color not taxed" (Art. 3, § 5), had the effect to abrogate and strike out the similar words in the provision relating to the reorganization of senate districts. (Art. 3, § 4.) *Id.*

CONSTITUTIONAL LAW.

1. While a statute limiting the time in which to bring an action upon contract is held to affect only the remedy, not the obligation; this is with the proviso that a reasonably sufficient time is left in which a party may, after the passage of the act, commence his action. *Parmenter v. State.* 154
2. A statute cutting down the right to commence an action upon a cause of action then existing, from a period without limitation to a few months after the passage of the act, does not give such reasonable time; and so, is unconstitutional. *Id.*
3. The legislature has the right to enlarge the time within which a claim against it may be filed, pro-

vided the claim as between citizens would not already be outlawed. *Id.*

4. A claim was presented under the special act of 1888 (Chap. 541, Laws of 1888), authorizing the Board of Claims to hear, audit and determine it. Claimant filed no claim with the board of audit, nor did he file any claim with the Board of Claims within the time limited by the act of 1884 (Chap. 60, Laws of 1884), for the filing of claims with the latter board which were formerly cognizable by the board of audit, *i. e.*, July 1, 1884. *Held*, that said act of 1888 was a valid exercise of legislative power, and gave the Board of Claims jurisdiction to determine as to the validity of the claim; that it was not violative of the constitutional provision (Art. 7, § 14) prohibiting the auditing or payment of any claim against the state "which, as between citizens of the state, would be barred by the lapse of time;" that construing said provision as meaning the general laws limiting the rights of citizens to commence similar actions, six years had not elapsed from the time the claim accrued up to July 1, 1884, when the right to file his claim was taken away; and so, as he had not had that time in which to commence his action, the claim as between citizens would not be outlawed. *Id.*
5. Also *held*, that, as the act organizing the Board of Claims (Chap. 205, Laws of 1888) gave no power to file the claim before that board, its jurisdiction being limited to claims accruing within two years prior to the filing of the claim, it only left him the time which elapsed between its passage and May 31, 1883 (about eight weeks), the time limited in which to file it with the board of audit, and thus have the benefit of a transfer to the Board of Claims, and that this, as between citizens, did not give a reasonable time. *Id.*
6. While it seems the legislature may constitutionally impose double taxation, its purpose so to do may never be inferred, but must plainly appear. *People ex rel. v. Coleman.* 231

7. The provision of the New York Consolidation Act (§ 715, chap. 410, Laws of 1882) authorizing the department of docks to acquire for the benefit of the city title, by proceedings *in invitum*, to any and all wharf property in the city not owned by it included in the plans adopted in pursuance of the provisions of the act of 1870 (Chap. 137, Laws of 1870), as amended by the act of 1871 (Chap. 574, Laws of 1871), is not rendered unconstitutional by the fact that the city is authorized in its discretion to lease its piers or to give the exclusive use of some of them for special kinds of commerce (§ 716). *In re Mayor, etc.* 258
8. Where a statute, by its own language, grants some power, confers some right, imposes some duty or creates some obligation, the fact that it refers to some other existing statute, general or local, in order to point out the procedure, or some administrative detail necessary for the accomplishment of the purposes of the act does not bring it in conflict with the provision of the State Constitution (§ 17, art. 3), declaring that: "No act shall be passed which shall provide * * * that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." *People ex rel. v. Lorillard.* 285
9. Accordingly held, that the act of 1890 (Chap. 249, Laws of 1890), providing for the acquisition and improvement of certain lands in connection with Washington bridge, was not rendered obnoxious to said constitutional provision because of the fact that it refers to another local act (Chap. 490, Laws of 1883) as to the method of procedure to be had to acquire title to the lands required. *Id.*
10. Before a court may determine that an act of the legislature is unconstitutional and void, a case must be presented in which there is no reasonable doubt; the incompatibility of the act with some provision of the Constitution must be manifest and unequivocal. *People ex rel. v. Rice.* 478
11. The constitutional provision (Art. 3, § 4) vesting in the legislature the power to alter the senate districts after each enumeration, and requiring this to be done so that "each senate district shall contain, as near as may be, an equal number of inhabitants," etc., grants to the legislature a discretion in carrying out the power, and the court has no jurisdiction to review the exercise of this discretion, unless it appears that it has been plainly and grossly abused (ANDREWS and FINCH, JJ., dissenting). *Id.*
12. Accordingly held (ANDREWS and FINCH, JJ., dissenting), that the Apportionment Act of 1892 (Chap. 397, Laws of 1892) was not violative of any constitutional provision, and so, was valid. *Id.*

CONSTRUCTION.

1. Words of survivorship and gifts over on the death of the primary beneficiary are to be construed unless a contrary intention appears, as relating to the death of the testator. *Nelson v. Russell.* 137
2. A constitutional provision, which attempts to regulate the language and forms of expression to be used in legislative enactments, is not to be so construed as to embrace cases not fairly within its general purposes or policy, or the evils it was intended to correct, although they may be within its letter. *People ex rel. v. Lorillard.* 285
3. A constitutional provision is not to be so construed as to work a public mischief, unless its language is of such explicit and unequivocal import as to leave no other course open to the court, and when its intent is ascertained, that must prevail over its letter. *Id.*

CONTEMPT.

Where, on the day of a general election one of the justices of the Supreme Court, upon application made to him at chambers, issued a peremptory writ of mandamus commanding inspec-

tors of election to permit the relator to take the disability oath provided in the election law, and upon taking the oath to retire with a person of his selection to a booth for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared, and where, upon due proof of service of the writ upon the inspectors, and their refusal to obey it, an order was made adjudging one of them guilty of contempt, and imposing upon him a punishment therefor. *Held*, that the justice had no jurisdiction to issue the writ; and so, that disobedience thereto could not be punished as a contempt. *People ex rel. v. Donoran.* 76

CONTRACT.

1. The claimant in 1876 entered into a contract with the state to do certain printing of a public nature for two legislative sessions for \$47,500 each session. Attached to the contract was an alternative bid which had been made by claimant giving specified prices for each piece of work. The contract contained this provision: "In the event of an extra session the said work shall be done and materials furnished for the prices stated in the alternative bid annexed, and the same prices shall also be paid for any work and materials ordered not for the use of the legislature." Upon a claim for work ordered by the legislature during the two sessions, but not for its use, *held*, that this work was not included in the gross sum, but claimant was entitled to payment therefor at the prices specified in the bid annexed; that the words "not for the use of the legislature" were not limited to work ordered at an extra session. *Parmenter v. State.* 154
2. While in an action for a breach of contract the plaintiff is entitled to recover all the damages occasioned by the defendant's breach, they must be such only as flow directly and naturally therefrom and must be certain both in their nature and in respect of the cause from which they proceed. *Rochester L. Co. v. Stiles & F. P. Co.* 209
3. One K. entered into a contract with defendant by which the latter agreed to make and deliver to the former certain dies to be used in the manufacture of lanterns, in which business K. proposed to engage, but was not then engaged, and it did not appear that he contemplated doing so until the dies were furnished. Plaintiff was subsequently incorporated and K. assigned the contract to it; there had been at that time no breach thereof. In an action to recover damages for failure to deliver the dies, it appeared that plaintiff, for the sole purpose of carrying on said business, rented premises and employed men, and it was allowed, as items of damages, the expenses so incurred. *Held*, error; that the natural obvious consequences of the breach would be to compel K. or his assignee to procure the dies elsewhere and the increased cost, if any, would be the proper measure of damage; that even if K. could have recovered special damages, an assignee, of whose connection with the contract defendant had no notice, could not recover any such damages which were not contemplated when the contract was made. *Id.*
4. P. and A., who were owners of adjacent lots, made an agreement in writing providing that either party, his heirs or assigns, might erect a party wall, one-half on each lot, the other party, his heirs or assigns to have the right to use the same by paying to the party erecting said wall at the time the same shall be so used, one-half the value thereof, and the same shall forever remain as a party wall. It was stated in the agreement that it shall be construed "as covenants running with the land." The agreement was signed and acknowledged by A. only, and was recorded. P.'s grantee built upon his lot a house with a party wall, and plaintiffs subsequently acquired title to the premises through various conveyances, each of which was made subject to the party-wall agreement, S. became the owner of A.'s lot and commenced to build thereon, making use of the party wall; while building S. conveyed to

defendants, making no reference to said agreement. In an action to restrain defendants from using said wall until payment to plaintiffs of one-half the value thereof, and for such further relief as might seem proper, the judgment directed payment to plaintiffs of the value of one-half the wall; charged defendants' premises with such payment, and directed that unless made they be sold to satisfy the judgment. *Held*, no error; that while the relief demanded was an injunction, with all the facts before it, it was proper for the court to administer further equitable relief and give to the agreement such legal effect as would accomplish exact justice between the parties; that whether the agreement was to be considered a common law obligation personally enforceable, or an instrument which impressed a lien upon the land, when it was availed of it was enforceable against the land. *Mott v. Oppenheimer*. 812

5. Also *held*, the objection that the agreement appeared to have been executed by but one of the parties and, so, was invalid as lacking mutuality, was not tenable, as the proofs showed that the contract had been made and defendants, standing upon A's title, were not entitled to make the objection. *Id*.

6. Also *held*, the objection that because the conveyance to defendants from S. contained no reference to the agreement they were not bound, was untenable, as the agreement was a charge upon the land, and if defendants did not have actual, they had constructive notice from the public records and so were bound. *Id*.

7. Also *held*, that the agreement was, by reason of the expressed intention of the parties, a covenant running with the land, and its effect was to grant or to create an interest in the premises. *Id*.

8. In an action to rescind a contract for the purchase of real estate and to recover \$200 purchase money paid, and \$203.51 expenses of search and disbursements, the

complaint also alleged that plaintiff was by the terms of the contract to receive the rent of the premises from June 1st to 15th, and without alleging the amount thereof asked to recover the same. The judgment was for defendant. *Held*, that the amount involved was less than \$500, and so the judgment was not reviewable here; that as plaintiff sought to rescind the contract he could not at the same time claim the rent of the premises he would have been entitled to had he performed it. *Miele v. Deperino*. 618

9. Where a committee of railroad mortgage bondholders appointed on foreclosure sale of the mortgaged property, for the purpose of effecting a reorganization, enter into a contract within the scope of the authority given to them, an action to have the contract adjudged null and void is not sustainable, in the absence of any claim of fraud on the part of those contracting with the committee or participation on their part in some fraud of the committee; it is not sufficient to aver conduct on the part of the latter which might as between them and the bondholders amount to a violation of their trust duties. *Brooks v. Dick*. 652

See CHARTER PARTY.

COVENANTS.

GUARANTY.

INSURANCE (FIRE).

INSURANCE (LIFE).

LEASE.

RESCISSION.

SPECIFIC PERFORMANCE.

CONVERSION.

1. In an action for conversion, the market price of the property is ordinarily the measure of its value. *Parmenter v. Fitzpatrick*. 190

2. It is not necessary to prove any particular number of sales in order to establish the market value. *Id*.

3. Proof of the price obtained at an actual *bona fide* sale of the property fairly conducted and not

forced, whether at auction or private sale, is competent upon the question of such value. *Id.*

4. In an action against a sheriff for the alleged unlawful levy upon and sale at Plattsburgh of a stock of goods on execution, it appeared that the greater portion of the goods was old shop-worn stock. The goods were mostly purchased in bulk by the judgment creditors, who sent portions of them to Syracuse and to Utica for sale, and they were there sold. Defendant offered to prove on trial that the purchasers used their best endeavors to sell the goods to the best advantage, and that the sales realized a price stated, also that the entire stock so bid off was sold at the best price which could be realized, which was less than that for which they were bid off. This was objected to and excluded. *Held, error. Id.*

CORPORATIONS.

1. The provision of the Revised Statutes (1 R. S. 388, § 4, subd. 71) exempting "the personal estate of every incorporated company not made liable to taxation on its capital" includes only corporations having a capital, which is not liable to taxation as such; it does not embrace corporations having no capital. *People ex rel. v. Coleman.* 231
2. A corporation organized under the laws of another state having property in this state can claim no exemption from taxation on account of the laws of its own state. *Id.*
3. The immunity from liability of a corporation, exercising a power or privilege conferred by law for the public benefit, for a private injury, where the damage sustained is the result of the proper exercise of the power or privilege, does not extend to acts which are *ultra vires*, or to those which are equivalent to a confiscation or condemnation of property rights, unless provision is made for due compensation. *Hudson River Tele-*

phone Co. v. Watervliet Tpke. & R. Co. 393

See BANKS AND BANKING.
INSURANCE (LIFE).
INSURANCE (FIRE).
MUTUAL BENEFIT ASSOCIATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
TELEGRAPH COMPANIES.

COSTS.

1. When the defeated party in an action of ejectment takes a new trial as authorized by the Code of Civil Procedure (§ 1525), paying the costs including an extra allowance, this does not prevent the granting another extra allowance against him in case of his defeat upon the second trial. *Bolton v. Schriever.* 65
2. Under the provision of the Code of Civil Procedure (§ 8234), providing that where in certain actions the complaint sets forth separately two or more causes of action upon which issues are joined, and each party "recovers on one or more of the issues," each is entitled to costs, the fact that defendant has defeated one or more of the causes of action does not alone entitle him to costs; there must be a recovery in his favor, *i. e.*, an affirmative finding, verdict or judgment in his favor which will have the effect of disposing of the cause of action as to which plaintiff has failed. *Burns v. D., L. & W. R. Co.* 268
3. Where, therefore, a complaint set forth separately three distinct causes of action, which were put in issue, and on the trial the plaintiff was nonsuited as to two of them, but had a verdict as to the other, *held*, that defendant was not entitled to costs. *Id.*
4. Among the items of plaintiff's costs taxed was one of \$30 for attending the taking of depositions of three witnesses in another state, two of the witnesses were examined for plaintiff and one for defendant. their testimony related to one of the causes of action, as

to which the plaintiff was non-suited. *Held*, that under the provision of the Code (§ 325) entitling a party to \$10 "for taking the deposition of a witness," plaintiff was entitled to that sum; that a commission having been issued, the statutory allowance followed the right to costs, and neither the taxing officer nor the court could institute an inquiry as to the necessity therefor, and the allowance did not depend upon success as to the particular cause to which the proof was directed, but only upon such success in the action as carried with it a right to general costs; but *held*, that only one fee of \$10 could be charged, not that sum for every witness examined.

Id.

5. Where a party to an action succeeds to the extent that he is entitled to general costs and disbursements, every legal disbursement incurred in good faith in the case follows and cannot be defeated by showing that it was incurred in an unsuccessful attempt to establish a separate cause of action as to which the party fails. *Id.*

6. Another item taxed was \$34.50 for commissioners' fees in taking the depositions; there was no proof before the Special Term or the clerk that the commissioners' fees were paid or any obligation to pay them incurred, or that the item was in any way a necessary or proper disbursement. *Held*, that the item was improperly taxed.

Id.

7. A motion by defendant for an extra allowance in an action brought by plaintiff, a corporation organized under the act providing for the incorporation of telegraph companies (Chap. 265, Laws of 1848), to restrain defendant from operating its road by the single-trolley system upon certain streets in the city of Albany, was denied upon the ground of want of power, the reason assigned being "that the action being to restrain defendant from employing a particular system only, and over a part only of its road, the franchise was not involved, and there is, therefore, no basis on which an allow-

ance can be estimated." *Held*, error; that as the subject-matter litigated was the right of defendant to use the single-trolley system, if the right thus sought to be enjoined had a money value, and there was any evidence to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion and dispose of the application upon the merits. *Hudson River Telephone Co. v. Waterliet Tpke. & R. Co.* 898

COURTS.

See COURT OF APPEALS.
SURROGATE'S COURT.

COURT OF APPEALS.

1. The provision of the Code of Civil Procedure (§ 791) which specifies as one of the causes entitled to a preference "a cause entitled to a preference by the general rules of practice" (sub. 10, § 791) does not apply to this court (§ 3347.) *Nichols v. Scranton S. Co.* 684

2. To obtain a preference upon the calendar of this court, in a case not designated by said Code or the rules of the court, the application must be addressed to the discretion of the court, upon a showing of such facts as may be deemed to render a preference proper in the interests of justice. *Id.*

3. Upon motion for a preference the sole facts relied upon were that certain certificates of stock belonging to the appellant had been levied upon by virtue of and were held under an attachment issued in the action. *Held*, that this did justify the granting of the motion. *Id.*

COVENANTS.

1. It is not sufficient that the performance of a covenant by a grantee in a deed may benefit a third person, to entitle the latter to enforce it, but the covenant must have been entered into for

his benefit, or such benefit must be the direct result of performance and so, within the contemplation of the parties, and the grantor must also have a legal interest that the covenant be performed in favor of the party claiming performance. *Durnherr v. Rau*. 219

2. Where a covenant concerns land and is one which is capable of being annexed to the estate, and it appears by the instrument that such was the intention of the parties, it is to be construed as running with and charging the land. *Mott v. Oppenheimer*. 312

See LEASE.

COMMISSIONERS OF LAND OFFICE.

See PATENT (FOR LANDS).

CREDITOR'S SUIT.

1. In an action by plaintiffs, who were judgment creditors of T., to reach and appropriate to the payment of their judgment certain real estate purchased by T. and by him procured to be conveyed to C., his daughter, the court found that the conveyance was procured by T. in contemplation of insolvency and with intent to defraud creditors; and that he furnished the consideration paid for the property, but that the grantee was free from fraud in the transaction; that about two months after the transfer a judgment was recovered against T., an execution issued thereon and returned unsatisfied, and subsequently said judgment was transferred to C. for a valuable consideration. Plaintiffs' judgments were recovered about a year afterwards. A judgment was rendered directing the property to be transferred to a receiver, the proceeds to be applied in satisfaction of plaintiffs' judgment, in disregard of C.'s right as a judgment creditor. *Held*, error; that while under the statute (1 R. S. 728, §§ 51, 52) the property in the hands of C. was charged with a trust in favor of T.'s creditors, she being a judg-

ment creditor as well as the grantee was both trustee and *cestui que trust*; that plaintiffs by bringing their action acquired no superior rights or equities; that conceding the rule giving to the vigilant creditor the fruits of his vigilance by recognizing the priority of his lien was applicable, it was satisfied and such priority secured by the union in C. of both the title to the property and to the prior judgment, with all legal remedies for its collection exhausted; that she having title and possession was not required to bring an action which would be substantially against herself in order to preserve her claim as a judgment creditor. *Brown v. Chubb*. 174

2. In an action brought by C., a judgment creditor, to set aside certain transfers of real estate made by the debtor and others as fraudulent and void as against creditors, it appeared that one W., also a judgment creditor, had previously brought an action for the same purpose, against the same defendants, pending which he made an assignment for the benefit of his creditors to C., who was substituted as plaintiff therein in his representative capacity. The court in such action having found the transfer to have been made in good faith and valid, judgment was directed and entered in favor of the defendants. The complaint in the former action and in this contained the same allegation as to fraud, and the answers in both were general denials. *Held*, that the former judgment was not a bar or conclusive, by way of estoppel, against plaintiff on the question of fraud. *Collins v. Hydorn*. 320
3. Also *held*, that the former judgment was not a judgment *in rem*, and so, the rule making such a judgment conclusive against all the world did not apply. *Id.*
4. In an action, by a creditor, to set aside as fraudulent, a judgment in favor of another creditor entered upon an offer of the debtor to allow it, the burden is upon plaintiff to show that the indebtedness did

not exist and defendant is not called upon to establish its existence or *bona fides* until it has been impeached. *Columbus Watch Co. v. Hodenpyl.* 430

5. One member of a firm died leaving a will by which he directed his executors to "conduct his interest in the business" in the firm name in conjunction with the surviving partner; the business was so carried on. Subsequently judgments were recovered against the firm and executions issued thereon. In an action by other creditors, among other things, to set aside said executions, *held*, that the provisions of the Code of Civil Procedure in relation to the issuing of executions against executors did not apply (§§ 1731, 1825, 1826), that as to the fund belonging to the estate, left under the directions of the will invested in the business, the executors became copartners and the debts incurred in the business were claims upon the partnership primarily and not upon the testator's general estate; and that the creditors dealing with the new partnership had the usual rights of partnership creditors. *Id.*

6. Also *held*, that said provisions did not apply to executions issued upon judgments against the firm which were rendered upon debts originally owing by the old firm, but which had, with the consent of the judgment creditors, been assumed by the new firm. *Id.*

7. A general creditor cannot maintain an action to have judgments obtained against his debtor by other creditors set aside on the ground that they were improperly or fraudulently entered; until his claim has been established by a judgment and execution returned unsatisfied he cannot come into a court of equity for assistance to prevent or redress an alleged fraud. *Frothingham v. Hodenpyl.* 630

CRIMINAL TRIAL.

1. Upon a criminal trial, certain anonymous letters were introduced in evidence by the prosecu-

tion; for the purpose of showing that they were written by defendant; a number of genuine specimens of his handwriting were put in evidence and experts were called as witnesses who, after a comparison of the letters with such specimens, testified that they were all written by the same hand. Defendant, for the purpose of testing the accuracy of the judgment, submitted different specimens of handwriting to said witnesses who after comparing them with the letters and specimens put in evidence by the people, testified that some of them were written by the same person who wrote the letters. Defendant then offered to prove that the specimens so submitted were not in the handwriting of defendant, but were written by another person; this evidence was excluded. *Held*, no error; that it was collateral matter and defendant was bound by the answers of the witnesses. *People v. Murphy.* 450

2. The indictment was for arson in setting fire to a barn. Defendant had been in the employ of the owner of the burned barn as coachman and gardener and had been discharged. A poisonous preparation had been kept in the barn. Defendant knew of this and had used it for the destruction of insects in the garden. The prosecution was permitted to prove, under objection and exception, that upon the night of the fire, and before it occurred, certain animals in the barn belonging to the owner were poisoned with the this preparation; that his carriages and cutters in the barn and an adjoining one were cut and damaged, while carriages and cutters in the same barns belonging to another were not injured. *Held*, that the evidence was competent, as it tended clearly to prove that the fire was not accidental, and that its origin was instigated by malice, also that the fire and the malicious injury were part of the same criminal scheme, and that it was carried out by some person having an intimate knowledge of the surroundings; and so, it was properly received, although it may have tended to

establish defendant's guilt of a crime other than the one set forth in the indictment. *Id.*

3. One T. was convicted of the crime of forgery in the second degree under an indictment which contained a single count and charged that he "did make, forge and alter, and put off as true," the indorsement of one D. on a promissory note. The evidence was conflicting as to whether the indorsement was written by defendant, but there was evidence which justified a finding that he wrote it or procured it to be written, being present at the time, aiding and abetting the forgery, and it was not controverted that he uttered or offered to pass the note. Defendant's counsel requested the court to direct a verdict in his favor on the ground that the evidence did not warrant a conviction of the crime of which he was charged, and he moved for an arrest of judgment on the same ground. Both motions were denied. *Held*, no error; that as no demurrer was taken, the objection that two distinct offenses were charged in one count of the indictment will be deemed to have been waived and did not constitute a ground for which the judgment could be arrested. (Code Crim. Pro. §§ 325, 467.) *People v. Tower.* 457

4. A fugitive from justice, surrendered to the authorities of this state by the governor of another state, may be held and tried here for a crime other than that charged in the warrant by virtue of which he was arrested and surrendered, where the act for which he was extradited and that for which he is indicted and held, is the same. *People ex rel. v. Cross.* 536

5. Where a defendant in a criminal action offers himself as a witness, he is subject to the same rules of examination as apply to other witnesses. *People v. McCormick.* 663

6. Upon trial of an indictment for murder, the defendant was called as a witness in his own behalf. Upon cross-examination, he was asked if he did not, at a time and

places specified, draw a pistol upon two persons and threaten to shoot them. This was objected to, and objection overruled. *Held*, no error; that the evidence was competent as affecting the credibility of the witness. *Id.*

DAMAGES.

1. Interest may legally be allowed by a jury, in its discretion, in estimating the amount of damages sustained by the plaintiff through an injury to his property caused by the negligence of the defendant. The interest may be computed on the amount of the depreciation in value of the property. *Wilson v. City of Troy.* 96
2. The distinction in this respect between actions sounding in tort, and actions to recover unliquidated damages on contract pointed out. *Id.*
3. A riparian owner, who, by his willful act, diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages. *Hartshorn v. Chaddock.* 116
4. In an action to recover such damages, when the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than the diminution in the market value of the whole property by reason of the injury, the cost of restoration is the proper measure of damages, to which may be added the loss of the use of the property in consequence of the injury; but when the cost of restoring is more than such diminution, the latter is usually the true measure of damages. *Id.*
5. In such an action, evidence showing both the cost of restoring the land to its former condition and the diminution in its market value is admissible. *Id.*
6. When damages are to be assessed upon one or the other of these two

methods, according to the circumstances, and plaintiff's proof is confined to one of them, and defendant fails to supply proof as to the other, or to raise any question on trial as to the failure of plaintiff to supply it, the omission may not be availed of on appeal. *Id.*

7. Where, in such an action, evidence was given by plaintiff showing the cost of restoring the land, and none was given by either party in regard to the effect of the injury upon the market value, *held*, that the evidence was sufficient to sustain an award of damages. *Id.*

8. In an action for conversion, the market price of the property is ordinarily the measure of its value. *Parmenter v. Fitzpatrick.* 190

9. It is not necessary to prove any particular number of sales in order to establish the market value. *Id.*

10. Proof of the price obtained at an actual *bona fide* sale of the property fairly conducted and not forced, whether at auction or private sale, is competent upon the question of such value. *Id.*

11. While in an action for a breach of contract the plaintiff is entitled to recover all the damages occasioned by the defendant's breach, they must be such only as flow directly and naturally therefrom and must be certain both in their nature and in respect of the cause from which they proceed. *Rochester L. Co. v. Stiles & P. P. Co.* 209

12. One K. entered into a contract with defendant by which the latter agreed to make and deliver to the former certain dies to be used in the manufacture of lanterns, in which business K. proposed to engage, but was not then engaged, and it did not appear that he contemplated doing so until the dies were furnished. Plaintiff was subsequently incorporated and K. assigned the contract to it; there had been at that time no breach thereof. In an action to recover damages for failure to deliver the dies, it appeared that plaintiff, for

the sole purpose of carrying on said business, rented premises and employed men, and it was allowed, as items of damages, the expenses so incurred. *Held*, error; that the natural obvious consequences of the breach would be to compel K. or his assignee to procure the dies elsewhere and the increased cost, if any, would be the proper measure of damage; that even if K. could have recovered special damages, an assignee, of whose connection with the contract defendant had no notice, could not recover any such damages which were not contemplated when the contract was made. *Id.*

DEBTOR AND CREDITOR.

1. Where a conveyance is constructively, but not actually fraudulent as against the creditors of the grantor, the grantee may hold the land as security for a debt honestly due him. *Brown v. Chubb.* 174

2. Where a judgment is entered for a debt justly due and owing, the fact that it was entered upon an offer to allow it, does not render it collusive in any sense which allows another creditor to interfere. *Columbus Watch Co. v. Hodenpyl.* 430

3. In an action by another creditor to set aside such a judgment as fraudulent, the burden is upon plaintiff to show that the indebtedness did not exist and defendant is not called upon to establish its existence or *bona fides* until it has been impeached. *Id.*

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).
CREDITOR'S SUIT.

DECEIT.

See FRAUD.

DEEDS.

1. In 1871 T., through an intermediate grantee, conveyed a farm to his wife. In 1877 he executed to

his daughter W., defendant, a deed of the farm, which was worth \$20,000. The deed stated the consideration to be ten dollars (which sum was in fact paid), and also the annual payment to the grantor during his lifetime of the entire net proceeds of the farm, and thereafter one-third of such proceeds to his wife during her lifetime, if she survived him, one-third to another daughter for the same period, and one-half to her after the death of both parents. The grantee was given power to sell the property after the mother's death, and if sold, the use of one-half the proceeds was to be paid to the sister during life, the principal to be controlled and managed by W. T. continued in possession of the farm until his death, and thereafter it was occupied by his widow and daughter until the death of the former, when W. took possession. The widow, after her husband's death, conveyed the farm to plaintiffs. W.'s deed was recorded in 1879; the deed to plaintiffs in 1888. In an action of ejectment, *held*, that while the consideration of W.'s deed rendered it good as between the parties, she was not "a subsequent purchaser for value," within the meaning of the statute, and her deed, although first recorded, constituted no bar to the maintenance of the action. *Ten Eyck v. Witbeck*. 40

2. Where, by applying the description contained in a deed to the premises, an ambiguity is raised, evidence may be given to explain it, and if some particular of the description is shown to be false or defective, that may be rejected, provided the balance is sufficient to show the intention of the parties; but if, when the description is so applied, no ambiguity is produced, parol evidence is inadmissible to show that it was not the intent to convey all the land included in the description. *Muldoon v. Deline*. 150

3. B., being the owner of certain premises, conveyed a portion thereof to plaintiff. The description in his deed gave the line between the portion conveyed and the residue as beginning at a cer-

tain point on the line of a street and running at right angles therewith. Subsequently, B. conveyed the residue to defendant. In an action of ejectment, it was conceded that the description included the land in controversy, which was a triangular piece lying between the line given in the deed and a line starting at the same point and running diagonally. Defendant offered to prove on trial by parol that it was not the intention of the parties to plaintiff's deed to include the land in question, and that the first course should have run diagonally instead of at right angles with the street. *Held*, that the evidence was properly rejected. *Id.*

4. It is not sufficient that the performance of a covenant by a grantee in a deed may benefit a third person, to entitle the latter to enforce it, but the covenant must have been entered into for his benefit, or such benefit must be the direct result of performance, and so, within the contemplation of the parties, and the grantor must also have a legal interest that the covenant be performed in favor of the party claiming performance. *Durnherr v. Rau*. 219

5. D., plaintiff's husband, executed to defendant a deed of certain premises, with covenant of warranty; he had previously executed a mortgage thereon in which plaintiff joined. The grantee covenanted to pay all incumbrances, "by mortgage or otherwise," and the deed declared that the grantor's wife reserved her right of dower in the premises. The mortgages were subsequently foreclosed and the premises sold. In an action for breach of the covenant plaintiff claimed as damages the value of her inchoate right of dower cut off by the foreclosure. *Held*, untenable; that the only legal operation of the clause concerning dower was to limit the warranty by excluding therefrom plaintiff's dower right; that plaintiff's joinder in the mortgages was a voluntary surrender of her dower right and bound her interest, to the extent necessary to protect the securities; that the essential relation

of debtor and creditor between the grantor and plaintiff, or such a relation as makes the performance of the covenant at the instance of plaintiff a satisfaction of some legal or equitable duty owing by the grantor to her was also lacking, as he owed her no duty, enforceable in law or equity, to pay the mortgages to relieve her dower. *Id.*

6. In an action to set aside a deed as a cloud on title, both parties claimed by purchase from the same grantor. Defendant's deed, which was the prior one, was perfect and valid upon its face. Upon it was a certificate of acknowledgment in the usual form signed by a notary public in and for the county of S.; the venue of the certificate was laid in that county and its county clerk authenticated in due form the official character of the notary. The deed was recorded in the county of T. where the land was situated and where the grantor lived. It appeared that the deed was in fact executed and acknowledged at the grantor's residence in the county of T.; it was executed for a good consideration, and there was no evidence that the grantor was the victim of any fraud, imposition, or duress. *Held*, that the plaintiff was estopped as against defendants from claiming that the deed was not duly acknowledged. *Mut. L. Ins. Co. v. Corey.* 326

7. In proceedings under the statute, the highway commissioners of a town made an order laying out a highway. The landowners appealed therefrom, and while the matter was pending before referees, said owners, for the purpose of inducing the referees to reverse the order appealed from, executed and delivered to them a deed to the town of an interest in the land described in the order, which interest was described in the deed as "the perpetual right of use of the above-described road during the time intervening between the first day of December and the first day of May in each and every year." The town was granted "the right to enter upon

and work said road at any season of the year, provided that, at any other period than the one above mentioned, the gates upon said road shall be kept closed." The referees, influenced by the deed, reversed the order, and filed the deed and their order with the town clerk. The commissioners of highways directed the road to be worked as a highway, and it was so cared for and worked for two years. In an action by the owners to restrain the overseer of highways and others acting under him, from working said road as a highway, *held*, that the deed was valid, and vested a title in the town according to its terms and for the purposes mentioned therein; and so, that the complaint was properly dismissed. *Hughes v. Bingham.* 347

8. Also *held*, that conceding the deed to be invalid, the court below had power in its discretion to deny the equitable relief sought, and leave the plaintiffs to their remedy at law. *Id.*
9. An exception or reservation, in a deed of uplands adjoining the Hudson river, of the water rights, privileges and grants appertaining to the land conveyed is wholly ineffectual where the grantor had, at the time of the conveyance, no grant from the state or title to the lands under water, and the grantor retains nothing which he can thereafter convey. *People ex rel. v. Comrs. etc.* 447
10. The fact that the grantor had previous to the conveyance, without any right, entered upon and filled up the land under water, gives him no title, and he did not thereby become a proprietor of "adjacent lands," within the meaning of the statutes controlling grants by said commissioners (1 R. S. 208, § 67); as between him and the state the land so filled in remains land under water. *Id.*

DEFINITION.

The words "from and after" used in a testamentary gift of a remainder, following a life estate, do not

afford sufficient ground in themselves for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context they are to be regarded as defining the time of enjoyment simply and not of the vesting of title. *Nelson v. Russell.* 187

DEPOSITIONS.

1. Among the items of plaintiff's costs taxed was one of \$30 for attending the taking of depositions of three witnesses in another state. Two of the witnesses were examined for plaintiff and one for defendant, their testimony related to one of the causes of action, as to which the plaintiff was nonsuited.

Held, that under the provision of the Code (§ 325) entitling a party to \$10 "for taking the deposition of a witness," plaintiff was entitled to that sum; that a commission having been issued, the statutory allowance followed the right to costs, and neither the taxing officer nor the court could institute an inquiry as to the necessity thereof, and the allowance did not depend upon success as to the particular cause to which the proof was directed, but only upon such success in the action as carried with it a right to general costs; but *held*, that only one fee of \$10 could be charged, not that sum for every witness examined. *Burns v. D. L. & W. R. R. Co.* 268

2. Another item taxed was \$34.50 for commissioners' fees in taking the depositions; there was no proof before the Special Term or the clerk that the commissioners' fees were paid or any obligation to pay them incurred, or that the item was in any way a necessary or proper disbursement. *Held*, that the item was improperly taxed. *Id.*

3. Under the Code of Civil Procedure (§ 2538) a Surrogate's Court has power in its discretion, to grant an order directing the issuing of a commission to examine before trial a party to a proceeding pending before it. *In re Plumb.* 661

DOWER.

D., plaintiff's husband, executed to defendant a deed of certain premises, which covenant of warranty; he had previously executed mortgages thereon in which plaintiff joined. The grantee covenanted to pay all incumbrances, "by mortgage or otherwise," and the deed declared that the grantor's wife reserved her right of dower in the premises. The mortgages were subsequently foreclosed and the premises sold. In an action for breach of the covenant plaintiff claimed as damages the value of her inchoate right of dower cut off by the foreclosure. *Held*, untenable; that the only legal operation of the clause concerning dower was to limit the warranty by excluding therefrom plaintiff's dower right; that plaintiff's joinder in the mortgages was a voluntary surrender of her dower right and bound her interest, to the extent necessary to protect the securities; that the essential relation of debtor and creditor between the grantor and plaintiff, or such a relation as makes the performance of the covenant at the instance of plaintiff a satisfaction of some legal or equitable duty owing by the grantor to her was also lacking, as he owed her no duty, enforceable in law or equity, to pay the mortgages to relieve her dower. *Durnherr v. Rau.* 219

DURESS.

Plaintiff had contracted to sell property upon which an assessment was imposed by defendant for a local improvement. The receiver of taxes published a notice and demanded payment, notifying plaintiff that the property would be sold unless the assessment was paid. Upon return to the warrant that the assessment was unpaid, defendant's board of trustees passed a resolution directing its treasurer to advertise and sell. Plaintiff then asked to be allowed to deposit with the vendee sufficient to cover the amount of such assessment, until a determination of the proceedings taken to test its legality. Said trustees refused

this request or to make any arrangement to delay the sale. Plaintiff then paid the assessment at the same time serving notice that she paid under protest and reserved her right to sue for and recover the same. In an action brought to vacate said assessment and to recover the amount paid the illegality of the assessment was conceded. *Held*, that such payment was involuntary it having been made under circumstances amounting to coercion at law; and that plaintiff, having established the invalidity of the assessment, was entitled to recover back the money paid. *Vaughn v. Village of Portchester.*

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EASEMENTS.

1. In an action to restrain defendant from interfering with the water of a certain spring, etc., the following facts appeared: In 1852, defendant granted to C., under whom plaintiff claims, and who owned an adjoining farm, for the use of said farm "all the water of said spring which can be conducted through one-half inch lead pipe," to be laid by C. All the water of said spring came through a crevice or opening in a rock fifteen inches below the surface. C. boxed the spring and laid pipe therefrom as stipulated, and thus conveyed the water to his farm. There was another spring upon defendant's farm about thirteen feet from the one in question, the water from which he conveyed to his house, and which furnished an abundant supply therefor. In 1884 and 1888, plaintiff without the consent, and against the protests of defendant, excavated the basin of his spring about twenty-three inches tapping the vein which supplied defendant's spring thus diverting the water therefrom. Defendant filled up the excavations so made restoring the spring to its original condition. *Held*, that the grant to C. had reference simply to the spring as it then was; that it was not intended by it to make defendant's whole farm servient for a supply of water that would flow through a one-half inch pipe; that plaintiff had no right to dig lower than was

necessary to take the water flowing from the crevice in the rock, and by so doing he became a trespasser, and defendant had the right to fill in the excavations thus made; and so, that the complaint was properly dismissed. *Furner v. Seabury.* 50

2. In proceedings, commenced by the trustees of a village, it appeared that the landowners had acquired title under deeds which recognized as a street the land sought to be acquired as laid out upon a map made by a former owner, who sold and conveyed by descriptions referring to said map, and that they had conveyed lots to different parties, by descriptions referring to that map and bounding the lots by said street as laid out on said map. *Held*, that the grantees of the original owner and the subsequent grantees in turn acquired an easement in the strip so designated as a street, and all the parties having recognized the map and bought and sold with reference to it, they had the right to have the strip kept open to its full width, after the manner and with the characteristics of a street and so, that said owners were only entitled to nominal damages. *In re Village of Olean v. Steyner.* 841

EJECTMENT.

1. In 1871 T., through an intermediate grantee, conveyed a farm to his wife. In 1877 he executed to his daughter W., defendant, a deed of the farm, which was worth \$20,000. The deed stated the consideration to be ten dollars (which sum was in fact paid), and also the annual payment to the grantor during his lifetime of the entire net proceeds of the farm, and thereafter one-third of such proceeds to his wife during her lifetime, if she survived him, one-third to another daughter for the same period, and of one-half to her after the death of both parents. The grantee was given power to sell the property after the mother's death, and if sold, the use of one-half the proceeds was to be paid to the sister during life, the principal to be controlled and managed

by W. T. continued in possession of the farm until his death, and thereafter it was occupied by his widow and daughter until the death of the former, when W. took possession. The widow, after her husband's death, conveyed the farm to plaintiffs. W.'s deed was recorded in 1879; the deed to plaintiffs in 1883. In an action of ejectment, *held*, that while the consideration of W.'s deed rendered it good as between the parties, she was not "a subsequent purchaser for value" within the meaning of the statute, and her deed, although first recorded, constituted no bar to the maintenance of the action. *Ten Eyck v. Witbeck.* 40

2. Where, prior to the passage of the acts providing in substance that the jurisdiction of a surrogate, in the cases specified, when the necessary parties were duly cited or appeared shall not in the absence of fraud be questioned collaterally (Chap. 359, Laws of 1870; Code Civ. Pro. § 2473), a resident of the state died seized of real estate in the county of New York, and upon petition of the executor named in his will, which alleged that the decedent was at or immediately preceding his death an inhabitant of the county, the will was by decree of the surrogate thereof admitted to probate and letters testamentary issued thereon, after a hearing and judicial investigation, at which hearing the heirs at law who were infants appeared by guardian, *held*, that the decree was in effect a decision, that the decedent was, at the time of his death, an inhabitant of said county; and that this could not be questioned in an action of ejectment brought by the heirs. *Bolton v. Schriever.* 65

3. When the defeated party in an action of ejectment takes a new trial as authorized by the Code of Civil Procedure (§ 1525), paying the costs, including an extra allowance, this does not prevent the granting another extra allowance against him in case of his defeat upon the second trial. *Id.*

ELECTION (OF OFFICERS).

1. Where, on the day of a general election, one of the justices of the Supreme Court, upon application made to him at chambers, issued a peremptory writ of mandamus commanding inspectors of election to permit the relator to take the disability oath provided in the election law, and upon taking the oath to retire with a person of his selection to a booth for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared, and where, upon due proof of service of the writ upon the inspectors, and their refusal to obey it, an order was made adjudging one of them guilty of contempt, and imposing upon him a punishment therefor. *Held*, that the justice had no jurisdiction to issue the writ; and so, that disobedience thereto could not be punished as a contempt. *People ex rel. v. Donovan.* 76
2. *It seems* that, as under the statutes of this state (§ 5, tit. 1, chap. 130, Laws of 1842, as amended by § 2, chap. 240, Laws of 1847), no court can be opened within it on election day, except to receive a verdict or discharge a jury, or for the exercise by a single magistrate of certain jurisdiction in criminal cases, a voter who is refused the right to vote can resort to no court for relief until after his right is lost. *Id.*
3. Under the provision of the "Reform Ballot Law" (§ 35, chap. 262, Laws of 1890, as amended by chap. 296, Laws of 1891), prohibiting the placing of any mark upon a ballot with intent that it may be identified, and providing that if a ballot cast has upon it any mark placed upon it with such intent "by the voter, or any other person to his knowledge," it shall be void; in order to condemn a ballot, it is necessary to prove that the ballot was marked either by the voter, or by another with his knowledge, with his intent or the intent known to him of such other person, that it might afterwards be identified. *People ex rel. v. Bd. Supra.* 523

4. To prove the requisite facts, however, it is not necessary to call the voter, or any person acting in complicity with him, but the same may be proved like other facts by any competent evidence; nor is it necessary to show who the voter was who cast the ballot; it is sufficient if it be shown that the ballot was marked with the illegal intent by whomsoever cast. *Id.*

5. The marks placed upon a ballot, or a series of ballots, may be of such character as of themselves to furnish strong proof that they were placed thereon for the purpose of identification, and with other circumstances, even slight, may establish the illegal intent. *Id.*

6. Under the provision of said act (§ 31), providing for the determination by mandamus of the question as to the validity of a ballot claimed to be invalid, and prescribing the steps to be taken preliminary to the proceeding, the fact that the inspectors failed to write their names upon the ballot, will not alone, when the other prescribed steps have been taken, prevent or defeat the mandamus proceeding. *Id.*

7. *It seems* that where, during or immediately after the completion of a canvass, a marked ballot is questioned as prescribed by the act, and a proceeding by mandamus is instituted as provided for, it is for the court to determine whether, under the circumstances of the particular case, there has been such a substantial compliance with the other requirements as to enable the relator to maintain the proceeding. *Id.*

8. Where a peremptory writ is issued, it must command precisely what, and no more than the party to whom it is directed, is legally required to do; if it requires more, while the court on application to quash may amend (Code Civ. Pro. §§ 721, 722, 723, 1997), it may, in its discretion, quash the writ, and the exercise of this discretion is not reviewable here. *Id.*

9. Where, therefore, the affidavits upon motion for a mandamus

under said act set forth facts showing clearly that a portion of the ballots which were questioned, were marked for the purpose of identification, which facts were not disputed; but the facts stated as to the residue failed to show that the ballots were so marked, and there was no allegation that they were questioned during the canvass, and a peremptory writ was issued requiring the board of county canvassers to recount the votes and reject all of those questioned, which writ was quashed; *held*, that the writ was defective in that it required too much; and that the order quashing it was not reviewable here. *Id.*

10. The writ was granted without notice to the board of canvassers; it appeared, and without objection made return submitting to the jurisdiction of the court. *Held*, that the objection of want of notice was only to be taken by the board and after such appearance and return it was too late for it to raise it. *Id.*

EMINENT DOMAIN.

1. Lands required for the construction of piers and wharves by a municipality, upon which such a duty has been imposed, of providing facilities for loading and unloading vessels, are required for a public use and may be taken under the right of eminent domain, although some portion may thereafter in the discretion of the municipality be divided off and placed in the exclusive possession of a lessee, to be used solely in the transaction of necessary business connected with the transportation of passengers and freight. *In re Mayor, etc.* 253

2. Accordingly, *held*, that the provision of the New York Consolidation Act (§ 715, chap. 410, Laws of 1892) authorizing the department of docks to acquire for the benefit of the city title, by proceedings *in invitum*, to any and all wharf property in the city not owned by it including in the plans adopted in pursuance of the provisions of the act of 1870 (Chap.

187, Laws of 1870), as amended by the act of 1871 (Chap. 574, Laws of 1871), is not rendered unconstitutional by the fact that the city is authorized in its discretion to lease its piers or to give the exclusive use of some of them for special kinds of commerce (§ 716). *Id.*

3. Also, *held*, that a sufficient grant of power was given by said provision to include in condemnation proceedings property of the nature described, used by a railroad or gas company for landing freight or other property. *Id.*

4. It is not necessary in such proceedings to show that the land proposed to be taken is required for the purpose of building any particular pier, dock or bulkhead; if required in order to enable the city to carry out its general plan, the statute permits its acquisition. *Id.*

5. While property already devoted to a public use, will not be regarded as subject to the right of condemnation for another public use unless the right is plainly granted by statute, it is not necessary that the statute should so in terms enact, it is sufficient if the right is conferred by necessary implication from the language used. *Id.*

6. The power of the federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state and separate a part of its territory from its jurisdiction, and the jurisdiction and authority of the state over lands so acquired by the United States by the exercise of the power of eminent domain, remains unchanged, except so far as their use for the purposes for which they were required necessarily removes them from the domain of state authority. *Barrett v. Palmer.* 336

ENUMERATION (OF INHABITANTS OF STATE).

See LEGISLATURE.

EQUITY.

1. The jurisdiction of equity to restrain the infringement of a trade-mark is founded upon the right of property in the plaintiff and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public, and a party invoking its aid must himself be free from fraud. *Prince Mfg. Co. v. Prince Mfg. P. Co.* 24

2. Any material misrepresentation therefore, in a label or trade-mark, as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity, although the defendant's conduct is without justification. *Id.*

3. Where a court in equity obtains jurisdiction for the purpose of an injunction and is in full possession of the merits it may, although the relief asked cannot properly be granted, retain the suit in order to do complete justice between the parties and administer such other equitable relief as the merits of the case justify. *Mott v. Oppenheimer.* 312

ESTOPPEL.

1. *It seems* that the intentional concealment by a releasee of a cause of action existing in favor of the releasor, of which he was ignorant, will be sufficient to estop the former from insisting upon any advantage to be derived from the mistake of the latter. *Kirchner v. New Home S. M. Co.* 182

2. In an action brought by C., a judgment creditor, to set aside certain transfers of real estate made by the debtor and others as fraudulent and void as against creditors, it appeared that one W., also a judgment creditor, had previously brought an action for the same purpose, against the same defendants, pending which he made an assignment for the benefit of his creditors to C., who was substituted as plaintiff therein in

his representative capacity. The court in such action having found the transfer to have been made in good faith and valid, judgment was directed and entered in favor of the defendants. The complaint in the former action and in this contained the same allegation as to fraud, and the answers in both were general denials. *Held*, that the former judgment was not a bar or conclusive, by way of estoppel, against plaintiff on the question of fraud. *Collins v. Hydorn*. 320

3. While, where under the law there is an entire lack of power to do an act in question, it may not be rendered valid by estoppel, if power to do it existed and there was a way in which it could be lawfully done, and it purports to have been so done, one who has induced another to act upon the assumption that it was in fact so done, may be estopped from questioning its validity. *Mut. L. Ins. Co. v. Corey*. 326

4. An estoppel relating to an interest in land passes with the land. *Id.*

5. The provision of the Code of Civil Procedure (§ 936), which declares that the certificate of acknowledgment of a conveyance is not conclusive and may be rebutted and its effect contested by one affected thereby, cannot be invoked to prevent the operation of an estoppel by deed. *Id.*

6. Where the owner executes a deed of real property and delivers the same, with a certificate thereon of an officer authorized by law to take acknowledgments, of the grantor's appearance before him at a place within his jurisdiction and of an acknowledgment by said grantor, of its execution, neither the latter nor one claiming title under a subsequent conveyance by him, can subsequently allege the falsity of the certificate or its invalidity, even upon a jurisdictional ground, for the purpose of impairing the estate of the grantee. *Id.*

7. In an action to set aside a deed as a cloud on title, both parties

claimed by purchase from the same grantor. Defendant's deed, which was the prior one, was perfect and valid upon its face. Upon it was a certificate of acknowledgment in the usual form signed by a notary public in and for the county of S.; the venue of the certificate was laid in that county and its county clerk authenticated in due form the official character of the notary. The deed was recorded in the county of T. where the land was situated and where the grantor lived. It appeared that the deed was in fact executed and acknowledged at the grantor's residence in the county of T.; it was executed for a good consideration, and there was no evidence that the grantor was the victim of any fraud, imposition, or duress. *Held*, that plaintiff was estopped as against defendants from claiming that the deed was not duly acknowledged. *Id.*

8. An allegation contained in an answer which has no reference to and does not admit any allegation of the complaint, is not a conclusive admission, and the defendant is not estopped thereby from proving a fact inconsistent with the allegation. *Ferris v. Hard*. 354

EVIDENCE.

1. Where, by applying the description contained in a deed to the premises, an ambiguity is raised, evidence may be given to explain it, and if some particular of the description is shown to be false or defective, that may be rejected, provided the balance is sufficient to show the intention of the parties; but if, when the description is so applied, no ambiguity is produced, parol evidence is inadmissible to show that it was not the intent to convey all the land included in the description. *Muldoon v. Deline*. 156

2. B., being the owner of certain premises, conveyed a portion thereof to plaintiff. The description in his deed gave the line between the portion conveyed and the residue, as beginning at a certain point on the line of a street

and running at right angles therewith. Subsequently, B. conveyed the residue to defendant. In an action of ejectment, it was conceded that the description included the land in controversy, which was a triangular piece lying between the line given in the deed and a line starting at the same point and running diagonally. Defendant offered to prove on trial by parol that it was not the intention of the parties to plaintiff's deed to include the land in question, and that the first course should have run diagonally instead of at right angles with the street. *Held*, that the evidence was properly rejected. *Id.*

3. Where a release is general in its terms and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol; the instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress or some like cause. *Kirchner v. New Home S. M. Co.* 182

4. So, also, if the words of a release fairly import a general discharge, their effect may not be limited so as to exclude a demand simply upon proof that at the time of its execution the releasor had no knowledge of the existence of the demand. *Id.*

5. The distinction in the rule as to the availability of parol evidence to contradict or modify the instrument, applicable to releases and that applied to receipts pointed out. *Id.*

6. In an action against a sheriff for the alleged unlawful levy upon and sale at Plattsburgh of a stock of goods on execution, it appeared that the greater portion of the goods was old shop-worn stock. The goods were mostly purchased in bulk by the judgment creditors, who sent portions of them to Syracuse and to Utica for sale, and they were there sold. Defendant offered to prove on trial that the purchasers used their best endeavors to sell the goods to the best advantage, and that the sales realized a price stated; also that the entire stock so bid off

was sold at the best price which could be realized, which was less than that for which they were bid off. This was objected to and excluded. *Held*, error. *Purmenter v. Fitzpatrick.* 190

7. In an action to foreclose a mortgage, executed in 1874 by husband and wife, upon land owned by the wife, securing the payment of a bond executed by the husband, which bond by its terms was conditioned for the payment of \$10,000, with interest, in four annual payments, the answers of the mortgagors alleged, in substance, as an affirmative defense, that the mortgage was executed to secure loans theretofore made and thereafter to be made to the obligor, denied that the sum stated was due thereon, and asked for an accounting. The complaint contained no averments as to the consideration. On the trial the husband testified that nothing was said at the time he executed the mortgage that it was to secure loans theretofore or thereafter made; but that the bond and mortgage were executed to be sold. The wife, to explain the contradiction between the answers and the husband's testimony, then offered to show that the latter informed the attorney who drew the answers that the bond and mortgage were executed and delivered to be sold, as absolute securities for his benefit, not as alleged in the answers; that the attorney advised him there was no legal difference, that the mortgagee would have the right to hold them as such securities, and that relying upon this advice, he and his wife put in the answers. This evidence was excluded on plaintiffs' objection. *Held* error; that plaintiff having permitted without objection the evidence to be given contradicting the answer, it was too late to claim that defendants were concluded thereby; and that defendants were entitled to an explanation of the contradiction; also, that the alleged admissions in the answers were not of such a character as to require the exclusion on that ground of evidence of an inconsistent fact. *Ferris v. Hard.* 354

8. The mortgage was executed to one B., and purports to secure payment to him of the sum named. The alleged indebtedness secured was to a firm of which B. was a member; it was claimed on the part of the wife that, as she executed the mortgage as surety for her husband, the contract was to be strictly interpreted in her favor, and it could not be enforced as security for the firm debt. *Held*, untenable; that either party to the instrument was entitled to show by parol, for any purpose except to prevent its operation as a valid mortgage, or to enlarge the liability incurred, that the consideration was different from that therein stated; and that this principle was not affected by the fact that one of the parties was a surety. *Id.*

9. Upon a criminal trial, certain anonymous letters were introduced in evidence by the prosecution; for the purpose of showing that they were written by defendant, a number of genuine specimens of his handwriting were put in evidence and experts were called as witnesses who, after a comparison of the letters with such specimens, testified that they were all written by the same hand. Defendant, for the purpose of testing the accuracy of the judgment, submitted different specimens of handwriting to said witnesses who, after comparing them with the letters and specimens put in evidence by the people, testified that some of them were written by the same person who wrote the letters. Defendant then offered to prove that the specimens so submitted were not in the handwriting of defendant, but were written by another person; this evidence was excluded. *Held*, no error; that it was collateral matter and defendant was bound by the answers of the witnesses. *People v. Murphy*. 450

10. The indictment was for arson in setting fire to a barn. Defendant had been in the employ of the owner of the burned barn as coachman and gardener and had been discharged. A poisonous

preparation had been kept in the barn. Defendant knew of this and had used it for the destruction of insects in the garden. The prosecution was permitted to prove, under objection and exception, that upon the night of the fire, and before it occurred, certain animals in the barn belonging to the owner were poisoned with this preparation; that his carriages and cutters in the barn and an adjoining one were cut and damaged, while carriages and cutters in the same barns belonging to another were not injured. *Held*, that the evidence was competent, as it tended clearly to prove that the fire was not accidental, and that its origin was instigated by malice, also that the fire and the malicious injury were part of the same criminal scheme, and that it was carried out by some person having an intimate knowledge of the surroundings; and so, it was properly received, although it may have tended to establish defendant's guilt of a crime other than the one set forth in the indictment. *Id.*

11. Where it appears from an instrument, when construed in its entirety, that it was intended as a security for a debt, although there is no express provision that upon the fulfillment of the condition, the conveyance shall be void, it is a mortgage, and if the amount secured is left indefinite and uncertain, this may be shown by any competent proof *dehors* the instrument. *Burrett v. Wright*. 548

12. An instrument which plaintiff sought to reform and to foreclose as a mortgage was in the usual form of a real estate mortgage; it was signed, sealed, and was duly acknowledged and recorded as a mortgage; it recited a money consideration of \$600; it contained a defeasance clause as follows: "This grant is intended as security for the payment of the sum of — in one year from the date of this instrument with interest semi-annually, and this conveyance shall be void if such payment is made as herein specified." The court held that the amount intended to be secured could not be

- shown by parol and that the mortgage was void for uncertainty. *Held*, error. *Id.*
13. In an action for slander plaintiff is entitled to prove, as bearing upon the question of malice, other slanderous statements than those set forth in the complaint, made by defendant, imputing the same charge as that embodied in the words set forth. *Enos v. Enos*. 609
14. It is not necessary that such other statements shall be in the same words or substantially the same as those set forth; it is sufficient if they are a repetition of the same calumny. *Id.*
15. Where an action for slander was based upon words charging a married woman with unchastity, *held*, that it was competent for plaintiff, as bearing upon the question of damages, to prove that she had a family of young children. *Id.*
16. Upon the hearing of a claim for damages to a farm by the overflow of a creek alleged to have been caused by water, which escaped through a defective dam built by the state across said creek, but which the state claimed was caused by freshets, the state was allowed to prove under objection and exception that obstructions created by bridges and railroad embankments below said farm hindered the discharge of the waters of said creek, *Held*, no error; that such evidence was relevant in considering the effect of freshets and their tendency to produce an overflow. *Spencer v. State*. 619
17. Plaintiff's complaint alleged in substance, among other things, that he was the owner of letters patent, securing to him the exclusive right to manufacture and sell a certain machine; that he granted to defendants the right to manufacture and sell the patented machine, the latter to pay a specified royalty; that defendants, for the fraudulent purpose of competing with and underselling the plaintiff, manufactured a machine resembling the plaintiff's, but of less value. The relief asked was an injunction, an annulment of the license, damages, etc. On the trial, plaintiff abandoning the grounds set out in the complaint, proceeded as for a recovery of royalties on the machines sold. Defendants offered in evidence the letters patent; these were objected to and excluded. *Held*, error; that they were competent upon the question as to whether defendants were manufacturing and selling the machine invented by plaintiff. *Brusie v. Peck Bros. & Co.* 622
18. A written contract for the manufacture and sale of certain machines to be used in the manufacture of wood pulp, contained a guaranty on the part of the vendor that the machines would take care of all the pulp produced from "four Scott grinders." In an action to recover the contract price, defendant set up as a counterclaim a breach of this guaranty. It appeared that such grinders were constructed of different productive capacities, and that defendant had contracted for four of said machines. *Held*, that plaintiff was properly permitted to show that the guaranty was given upon the representation of defendant that the "Scott grinders" contracted for had the capacity to produce a certain amount of pulp, and that the machines furnished would care for that quantity; that the receipt of the evidence was not in conflict with the rule excluding oral evidence to contradict or change a written instrument, as the evidence did not contradict, but simply explained the contract. *Bagley & S. Co. v. Saranac R. P. & P. Co.* 626
19. Upon trial of an indictment for murder, the defendant was called as a witness in his own behalf. Upon cross-examination, he was asked if he did not, at a time and place specified, draw a pistol upon two persons and threaten to shoot them. This was objected to, and objection overruled. *Held*, no error; that the evidence was competent as affecting the credibility of the witness. *People v. McCormick*. 663
- In an action to recover damages sustained by diverting the waters

of a stream and causing it to flow upon plaintiff's land, evidence showing both the cost of restoring the land and the diminution in value of the land is proper.

See Hartshorn v. Chaddock. 116

— Where there is no ambiguity in the terms of a provision of a will, evidence aliunde to explain it not competent.

See Bradhurst v. Field. 564

EXECUTION.

1. One member of a firm died leaving a will by which he directed his executors to "conduct his interest in the business" in the firm name in conjunction with the surviving partner; the business was so carried on. Subsequently judgments were recovered against the firm and executions issued thereon. In an action by other creditors, among other things, to set aside said executions, *held*, that the provisions of the Code of Civil Procedure in relation to the issuing of executions against executors did not apply (§§ 1731, 1825, 1826), that as to the fund belonging to the estate, left under the directions of the will invested in the business, the executors became copartners and the debts incurred in the business were claims upon the partnership primarily and not upon the testator's general estate; and that the creditors dealing with the new partnership had the usual rights of partnership creditors. *Columbus Watch Co. Hodenpyl.* 480

2. Also *held*, that said provisions did not apply to executions issued upon judgments against the firm which were rendered upon debts originally owing by the old firm, but which had, with the consent of the judgment creditors, been assumed by the new firm. *Id.*

EXECUTOR AND ADMINISTRATOR.

1. By his will B. gave all his property to his executors, in trust, to receive therents, etc., to sell, convey or otherwise dispose of it as they might deem best, and finally

"to apply the said estate, * * * together with the proceeds of any part or portions sold," as thereafter provided. The testator then gave to each of his said executors two-sevenths of his estate in fee, and the remaining three-sevenths they were to hold upon trust for certain beneficiaries named. B. had contracted to sell a portion of his real estate to P. Before the time fixed for the delivery of the deed B. died. His executors executed a deed to P. and received from him the purchase money unpaid. P. subsequently conveyed to D., who conveyed to plaintiff's testator. In an action for a specific performance of a contract by defendant to purchase said premises, he objected to the title on the ground that the executors had no power to convey in performance of their testator's contract, and so their deed vested no title in P. *Held*, untenable; that while the executors did not take any legal estate under the preliminary devise in trust of all the testator's property; the trust being an active one and enforceable as a power in trust, included every disposable interest, and gave to the executors power to convey a perfect legal title to the real estate in question, irrespective of the fact that the testator had by his contract to sell the same changed in equity the character of his estate therein. *Holly v. Hirsch.* 590

2. An executor of an assignee for the benefit of creditors is not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee, unless the executor has been substituted as assignee. *Steinhouser v. Mason.* 635

— Where executors under direction in will, leave invested in the business of a firm of which their testator was a member, his interest therein, they become copartners, and the provision of Code of Civil Procedure in relation to issuing execution against executors (§§ 1731, 1825, 1826), do not apply to executions against firm.

See Col. Watch Co. v. Hodenpyl. 480

EXTRADITION.

1. A fugitive from justice, surrendered to the authorities of this state by the governor of another state, may be held and tried here for a crime other than that charged in the warrant by virtue of which he was arrested and surrendered, where the act for which he was extradited and that for which he is indicted and held, is the same. *People ex rel. v. Cross.* 536
2. The obligations of the states of the union to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the Constitution of the United States (Art. 4, § 2), and is not limited to specific offenses but embraces all crimes; and as the condition that the state to which a fugitive is surrendered cannot try him for any other offense than that charged in the warrant of extradition is not expressed therein it cannot be implied. *Id.*
3. Where, therefore, in proceedings by habeas corpus, it appeared that the relator was extradited from Wisconsin, upon a requisition of the governor of this state, which stated that the relator stood charged with grand larceny upon an indictment here found, that after his return to this state the indictment for grand larceny was quashed and he was held upon an indictment for robbery in the first degree, both indictments being based upon the same acts. *Held*, that no principle of comity between the states, nor any legal right secured to the relator had been violated, and so, that his detention was legal. *Id.*

FINDINGS OF LAW AND FACT.

1. Where, upon appeal in action tried by the court or a referee, no case is made containing the evidence, but the appeal is based solely upon exceptions contained in the judgment-roll, and the findings of fact do not sustain the conclusions of law, it may not be assumed that there was evidence

justifying other findings which would sustain the conclusions; on the contrary, it is to be assumed that there was no such evidence, and when the conclusions of law have been properly excepted to, the judgment may not be sustained. *Rochester L. Co. v. Stiles & P. P. Co.* 209

2. The party succeeding should see to it that he has findings of fact sufficient to uphold his judgment, and if he does not he is exposed to the perils of a reversal by an appeal based solely upon exceptions to the legal conclusions. *Id.*

FORECLOSURE.

1. Under the provision of the Code of Civil Procedure (§ 1627) authorizing a deficiency judgment in a foreclosure suit for "the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds" it is not essential to such a judgment that the deficiency should be ascertained by a sale in the action; it is sufficient if it be ascertained by a sale in an action to foreclose a prior mortgage to which the party liable was a party. *Frank v. Davis.* 275
2. Where, therefore, after judgment for foreclosure and sale, containing the usual provision for a deficiency judgment, and pending an appeal therefrom the mortgaged premises were sold under a judgment of foreclosure and sale in an action to foreclose a prior mortgage thereon, to which action the parties to the first action were made parties, which sale left a surplus which, upon application of the plaintiff in the first action, was applied upon his judgment, leaving a deficiency, *held*, that he was entitled to a judgment for such deficiency; that for the purposes of his lien the surplus took the place of the mortgaged property, and the application thereof upon his judgment took the place of and was in lieu of a sale. *Id.*
3. *It seems* the legislative purpose in the enactments authorizing a deficiency judgment in such an

action was to bring the case within the rule, that where a court of equity obtains jurisdiction of an action it may retain it and give full relief both legal and equitable, so far as it relates to the same transaction or subject-matter. *Id.*

4. In an action to foreclose a mortgage, executed in 1874 by husband and wife, upon land owned by the wife, securing the payment of a bond executed by the husband, which bond by its terms was conditioned for the payment of \$10,000, with interest, in four annual payments, the answers of the mortgagors alleged, in substance, as an affirmative defense, that the mortgage was executed to secure loans theretofore made and thereafter to be made to the obligor, denied that the sum stated was due thereon, and asked for an accounting. The complaint contained no averments as to the consideration. On the trial the husband testified that nothing was said at the time he executed the mortgage that it was to secure loans theretofore or thereafter made; but that the bond and mortgage were executed to be sold. The wife, to explain the contradiction between the answers and the husband's testimony, then offered to show that the latter informed the attorney who drew the answers that the bond and mortgage were executed and delivered to be sold, as absolute securities for his benefit, not as alleged in the answers; that the attorney advised him there was no legal difference, that the mortgagee would have the right to hold them as such securities, and that, relying upon this advice, he and his wife put in the answers. This evidence was excluded on plaintiff's objection. *Held*, error; that plaintiff having permitted without objection the evidence to be given contradicting the answer, it was too late to claim that defendants were concluded thereby; and that defendants were entitled to an explanation of the contradiction; also, that the alleged admissions in the answers were not of such a character as to require the exclusion on that ground of evidence of

an inconsistent fact. *Ferris v. Hard.* 354

5. The mortgage was executed to one B., and purports to secure payment to him of the sum named. The alleged indebtedness secured was to a firm of which B. was a member; it was claimed on the part of the wife that, as she executed the mortgage as surety for her husband, the contract was to be strictly interpreted in her favor, and it could not be enforced as security for the firm debt. *Held*, untenable; that either party to the instrument was entitled to show by parol, for any purpose except to prevent its operation as a valid mortgage, or to enlarge the liability incurred, that the consideration was different from that therein stated; and that this principle was not affected by the fact that one of the parties was a surety. *Id.*
6. Also *held*, that as interest after the mortgage debt became due could only be recovered as damages at the rate prescribed by law, plaintiff was entitled to seven per cent on all sums unpaid up to the time the legal rate was reduced to six per cent, and from that time at that rate. *Id.*
7. The court has power on motion to relieve a purchaser on sale under judgment in a foreclosure suit, and where facts are shown sufficient to call upon the court to exercise its discretion, its determination is not reviewable here. *Crocker v. Goler.* 662

FOREIGN CORPORATIONS.

1. A foreign savings bank is liable to taxation upon its surplus invested in this state. *People ex rel. v. Coleman.* 281
2. A savings bank of another state which has invested a portion of its surplus in the purchase of stock of a bank in this state, is liable to assessment and taxation upon the value of the shares of said bank at the place where the bank is located (§ 312, chap. 409, Laws of 1882);

proper deductions being made for the liabilities of the savings bank. *Id.*

FORGERY.

One T. was convicted of the crime of forgery in the second degree under an indictment which contained a single count and charged that he "did make, forge and alter, and put off as true," the indorsement of one D. on a promissory note. The evidence was conflicting as to whether the indorsement was written by defendant, but there was evidence which justified a finding that he wrote it or procured it to be written, being present at the time, aiding and abetting the forgery, and it was not controverted that he uttered or offered to pass the note. Defendant's counsel requested the court to direct a verdict in his favor on the ground that the evidence did not warrant a conviction of the crime of which he was charged, and he moved for an arrest of judgment on the same ground. Both motions were denied. *Held*, no error; that as no demurrer was taken, the objection that two distinct offenses were charged in one count of the indictment will be deemed to have been waived and did not constitute a ground for which the judgment could be arrested. (Code Crim. Pro. §§ 325, 467.) *People v. Tower.* 457

FORMER ADJUDICATION.

1. Where, prior to the passage of the acts providing in substance that the jurisdiction of a surrogate, in the cases specified, when the necessary parties were duly cited or appeared shall not in the absence of fraud be questioned collaterally (Chap. 359, Laws of 1870; Code Civ. Pro. § 2473), a resident of the state died seized of real estate in the county of New York, and upon petition of the executor named in his will, which alleged that the decedent was at or immediately preceding his death an inhabitant of the county, the will was by decree of the surrogate thereof admitted to probate and letters testamentary

issued thereon, after a hearing and judicial investigation, at which hearing the heirs at law who were infants appeared by guardian, *held*, that the decree was in effect a decision, that the decedent was, at the time of his death, an inhabitant of said county, and that this could not be questioned in an action of ejectment brought by the heirs. *Bolton v. Schriever.* 65

2. Plaintiff commenced an action against her husband, P. and others, claiming in substance that the other defendants gave to P. a bond secured by mortgage for \$50,000, of which sum \$10,000 belonged to her, it having been delivered to P. upon his agreement that he would hold the mortgage in trust for her for that sum. The relief asked for was that it might be adjudged that plaintiff was the owner of said securities to the extent of \$10,000 and interest from their date, and that her rights as such owner be enforced. P. died pending the action and his executors were substituted as defendants. The referee found that \$5,000 of plaintiff's money was included in the mortgage, and to that extent P. took and held it as her agent and trustee, and she was entitled to the benefit of the securities for that sum with interest. Before entry of judgment plaintiff moved for leave to file a supplemental complaint, and that the case be referred back to the referee to report what if any payments had been made upon said securities and what interest should be allowed. She alleged payments had been made to P. of principal and interest, on the mortgage including the whole or the greater part of the sum belonging to her which he used and treated as his own, and claimed that he and his estate was by this act and the denial of her rights chargeable with compound interest. The motion was denied. Plaintiff thereupon commenced this action alleging that the mortgagors had paid all of the interest and \$17,000 of the principal, but that no part thereof had been received and kept for plaintiff. She asked for an accounting and that compound interest be allowed to her. Judgment was subsequently

entered in the first action. The defendants made a motion entitling the papers in both actions for leave to pay into court the amount of said judgment with interest for the benefit of plaintiff, which motion was opposed on the ground that she was entitled to more than simple interest. The motion was granted, the order providing that upon such payment the judgment should be fully discharged and satisfied. The money was paid to the county treasurer as directed and, upon subsequent motion by plaintiff, that officer was directed to pay and did pay over the sum deposited to her and her attorney, who satisfied the judgment. Defendants pleaded in the second action said judgment, its payment and satisfaction as a bar. *Held*, that the matters set forth as a cause of action in the second action were embraced within the issue in the former one; and so, that the judgment was a bar. *Price v. Holman*. 124

8. A former judgment concludes a party only in the character in which he was sued, and so, a judgment for or against an executor, administrator, assignee or trustee, as such, presumptively does not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved. *Collins v. Hydorn*. 320

4. In an action brought by C., a judgment creditor, to set aside certain transfers of real estate made by the debtor and others as fraudulent and void as against creditors, it appeared that one W., also a judgment creditor, had previously brought an action for the same purpose, against the same defendants, pending which he made an assignment for the benefit of his creditors to C., who was substituted as plaintiff therein in his representative capacity. The court in such action having found the transfer to have been made in good faith and valid, judgment was directed and entered in favor of the defendants. The complaint in the former action and in this contained the same allegation as to fraud, and the answers in both

were general denials. *Held*, that the former judgment was not a bar or conclusive, by way of estoppel, against plaintiff on the question of fraud. *Id.*

5. Also *held*, that the former judgment was not a judgment *in rem*, and so, the rule making such a judgment conclusive against all the world did not apply. *Id.*

FRAUD.

1. The jurisdiction of equity to restrain the infringement of a trade-mark is founded upon the right of property in the plaintiff and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public, and a party invoking its aid must himself be free from fraud. *Prince Mfg. Co. v. Prince M. P. Co.* 24

2. Any material misrepresentation, therefore, in a label of trade-mark, as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity, although the defendant's conduct is without justification. *Id.*

3. A party who has secured the confidence of the public in an article manufactured by him and identified by a trade-mark, on the ground that it is made from one material, of which the trade-mark is a guaranty, cannot, without advising the public, substitute another material, although as good as the former, and sell that upon the credit of the true article, and justify the false use of the trade-mark or label on the ground of similar quality. *Id.*

FRAUDULENT CONVEYANCES.

Where a conveyance is constructively, but not actually, fraudulent, as against the creditors of the grantor, the grantee may hold the land as security for a debt honestly due him. *Brown v. Chubb*. 174

GRANTOR AND GRANTEE.

See DEED.

GUARANTY.

1. *It seems* that one who guarantees generally the collection of a demand, thereby undertakes that it is collectible by due course of law, and only promises to pay when it is ascertained that it cannot be collected by suit, prosecuted to judgment without unnecessary delay against the principal, and execution issued thereon, and an endeavor so to collect is a condition precedent to a right of action against the guarantor. *Salt Springs Nat. Bank v. Sloan.*

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2. Insolvency is no excuse for a failure to prosecute. *Id.*

3. While in most cases the question as to what constitutes due diligence in the prosecution of such an action, where it arises upon undisputed evidence, is one of law only, if different inferences may fairly be drawn by equally intelligent and unbiased men from the evidence, it is for the jury to determine the question under proper instructions from the court. *Id.*

4. Defendant executed a bond which recited that certain drafts had been drawn upon the firm of B. & C., which were accepted by said firm and discounted by plaintiff; also, that the said firm had made an assignment for the benefit of creditors before any of the drafts became due. The condition of the bond was that defendant would within one year from its date pay plaintiff any sum remaining unpaid on said drafts up to \$5,000, and which it, "after due diligence, shall fail to collect" within that time from the drawers or their assignee. In an action upon the bond, *held*, that the rule governing general guarantees of collection, did not apply, as due diligence might be exercised during the time limited and yet no judgment have been recovered; that while the condition required the

exercise of due diligence against both assignors and assignee this, in case the assignment was valid, did not require the immediate commencement of legal proceedings against the assignee; that as long as he was proceeding with proper celerity in the execution of his trust, plaintiff was not required to take any legal action against him; that, while in case the assignment was fraudulent as against creditors, an action against the assignors and assignee might be necessary, if plaintiff examined this question with due diligence and ascertained that there were no grounds upon which to base an attack upon the assignment, and if the assignee duly performed his duties during the year, it could not be determined as matter of law that plaintiff had failed to exercise due diligence in this regard; that the fact that investigations in regard to the validity of the assignment were in progress might properly be considered upon the question as to whether due diligence was used as against the assignors; and, if it appeared that plaintiff was engaged in an investigation made in good faith and for the purpose of determining as to whether an action in tort or one upon the drafts should be brought against the assignors, it could not be said as matter of law that pending such investigation due diligence was not used, but the question was one of fact for the jury. *Id.*

5. Defendant, in April, 1885, for the stated purpose of giving W. credit with plaintiff, executed to it a guaranty of collection of all "checks, drafts and promissory notes," upon which W. was then or should thereafter be liable to it "as maker, indorser," etc. Plaintiff held at the time a demand note indorsed by P. In an action upon the guaranty these facts appeared: Plaintiff's president, in the latter part of 1885, informed defendant that it was taking no proceedings to collect the note, but was endeavoring to obtain payment of this and other indebtedness, from W., that this would take a long time and advised that it would be unwise

- and injudicious in defendant's interest if more was done toward pressing payment. Defendant approved this course. Plaintiff continued to press payment, but not succeeding, on July 17, 1886, wrote to W., that unless the note was paid before 3 P. M. it would "proceed to measures for collection." W. was then in plaintiff's city and could have been served with process; it was not served until November twenty-nine. An answer to the complaint was served January 7, 1887; on April eighth plaintiff's attorney moved to dismiss the answer as frivolous, and for judgment. The answer was withdrawn and on April fifteen judgment was entered. *Held*, that as matter of law plaintiff did not exercise due diligence; and that a submission of the question to the jury was error. *Chatham Nat. Bank v. Pratt.* 423
6. Defendant guaranteed the performance by one McK. of a contract contained in charter party, under which he hired a propeller from the W. S. Co., for one year from October 17, 1884, to be used in southern waters. McK. agreed to insure the vessel for one year for a certain amount, and assumed "all fire, marine and other risk of damage that may happen to said vessel, * * * which is not covered by fire and marine insurance," so provided for, McK. procured the insurance as agreed. Subsequent to October 17, 1885, the vessel was burned at sea. In an action upon the guaranty *held*, that the risks assumed by McK. were only such as were not covered by the insurance which he agreed to and did procure, and were limited to the period included in the charter party, and so, no liability was incurred by him or by defendant under said clause of the instrument. *Young v. Leary.* 589
7. By the charter party McK. agreed, on termination of charter, to deliver the vessel to the company in New York harbor. *Held*, that to this agreement a condition was implied of the continued existence of the vessel, and in case it was destroyed without fault of McK. before breach of the agreement, so that delivery was impossible, he was excused therefrom. *Id.*
8. But *held*, that as McK. failed to deliver the vessel at the end of the term, if the failure was not excused, there was a breach of the agreement, and the subsequent destruction of the vessel without his fault furnished no excuse for such breach. *Id.*
9. Defendant claimed that the obligation to deliver by October 17, 1885, was waived. It appears that sometime prior to the expiration of the year, while the vessel was in southern waters, negotiations were in progress between the parties, in which defendant participated, for the purchase of the vessel by McK. and that during such negotiations the time for the delivery passed. Subsequent to that time terms of sale were agreed upon and a mortgage was sent to McK., to execute as security for part of the purchase price. These negotiations were finally abandoned, and thereupon the vessel was sent north to be delivered, and was burned while on the way. The referee substantially found that there was a waiver of punctual delivery at the end of the term occasioned by delay in the negotiations for a purchase, but decided that such waiver was not material, as defendant, although a surety, was a party to the transactions causing the delay. *Held*, error; that if there was such a waiver and the time for delivery impliedly extended until a reasonable time after failure of the negotiations, and if during such extended time the loss occurred without the fault of McK., there was no breach of the agreement on his part, and so no liability of defendant as his surety. *Id.*
10. Defendant, after the expiration of the term and prior to the sending of the vessel north for delivery, procured an insurance upon her against loss by fire, for his own benefit, as the referee found; this he collected and retained the money for his own use. *Held*, that this did not render him liable under the pleadings in this action. *Id.*

11. A written contract for the manufacture and sale of certain machines to be used in the manufacture of wood pulp, contained a guaranty on the part of the vendor that the machines would take care of all the pulp produced from "four Scott grinders." In an action to recover the contract price, defendant set up as a counterclaim a breach of this guaranty. It appeared that such grinders were constructed of different productive capacities, and that defendant had contracted for four of said machines. *Held*,* that plaintiff was properly permitted to show that the guaranty was given upon the representation of defendant that the "Scott grinders" contracted for had the capacity to produce a certain amount of pulp, and that the machines furnished would care for that quantity; that the receipt of the evidence was not in conflict with the rule excluding oral evidence to contradict or change a written instrument, as the evidence did not contradict, but simply explained the contract. *Bagley & S. Co. v. Saranac R. P. & P. Co.* 626

HABEAS CORPUS.

Where, in proceedings by habeas corpus, it appeared that the relator was extradited from Wisconsin, upon a requisition of the governor of this state, which stated that the relator stood charged with grand larceny upon an indictment here found, that after his return to this state the indictment for grand larceny was quashed and he was held upon an indictment for robbery in the first degree, both indictments being based upon the same acts. *Held*, that no principle of comity between the states, nor any legal right secured to the relator had been violated, and so that his detention was legal. *People ex rel. v. Cross.*

HIGHWAYS.

1. A plaintiff having a cause of action which entitles him to an injunction restraining the unlaw-

ful maintenance and operation of a railroad in a street in front of his premises, by reason of its continuous interference with his rights of property, may unite with a demand for such equitable relief and for damages, because of such interference, a claim for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway. *Lanning v. Galusha.* 239

2. An allegation of negligence on the part of the defendants in the operation and management of a train, which the complaint alleges caused the special injury is not necessary, as the unauthorized and continuous obstruction of the highway is a public nuisance, and a person sustaining a special injury therefrom is entitled to recover his damages, irrespective of the question of negligence at the time of the injury. *Id.*
3. A municipality by commencing proceedings under its charter to acquire land for the purposes of a street admits the landowner's right, and it may not claim in such proceedings that the land has been dedicated by the owner to the public use as a highway. *In re Village of Olean v. Steyner.* 341
4. In such proceedings, commenced by the trustees of a village, it appeared that the landowners had acquired title under deeds which recognized as a street the land sought to be acquired as laid out upon a map made by a former owner, who sold and conveyed by descriptions referring to said map, and that they had conveyed lots to different parties, by descriptions referring to that map and bounding the lots by said street as laid out on said map. *Held*, that the grantees of the original owner and the subsequent grantees in turn acquired an easement in the strip so designated as a street, and all the parties having recognized the map and bought and sold with reference to it, they had the right to have the strip kept open to its full width, after the manner and with the characteristics of a street and so, that said owners were only entitled to nominal damages. *Id.*

5. It appeared that the contesting landowners had fenced in, planted and adorned the strip, and one of them had a house upon it; they claimed that the easement was extinguished by adverse possession. *Held*, that an adverse possession could not be founded upon these acts, because of the presumption flowing from the acceptance by them of their deeds and from the conveyances made by them, that they entered in subordination to the servitude imposed, and occupied only temporarily until the use of the easement should be required. *Id.*
6. A town, in its corporate capacity, has power to take lands for highway purposes, by conveyance voluntary or otherwise. *Hughes v. Bingham.* 347
7. The power to take by voluntary conveyance implies the power to take such interest as the necessity of the case, or the public good, may require, and so, where a use for only a portion of the year is required, the town may take a conveyance limited to such use. *Id.*
8. In proceedings under the statute, the highway commissioners of a town made an order laying out a highway. The landowners appealed therefrom, and while the matter was pending before the referees, said owners, for the purpose of inducing the referees to reverse the order appealed from, executed and delivered to them a deed to the town of an interest in the land described in the order, which interest was described in the deed as "the perpetual right of use of the above-described road during the time intervening between the first day of December and the first day of May in each and every year." The town was granted "the right to enter upon and work said road at any season of the year, provided that, at any other period than the one above mentioned, the gates upon said road shall be kept closed." The referees, influenced by the deed reversed the order, and filed the deed and their order with the town clerk. The commissioners of highways directed the road to be worked as a highway, and it was so cared for and worked for two years. In an action by the owners to restrain the overseer of highways, and others acting under him, from working said road as a highway, *held*, that the deed was valid, and vested a title in the town according to its terms and for the purposes mentioned therein; and so, that the complaint was properly dismissed. *Id.*
9. Also, *held*, that conceding the deed to be invalid, the court below had power in its discretion to deny the equitable relief sought, and leave the plaintiffs to their remedy at law. *Id.*
10. After the delivery and acceptance of the deed, and a recognition of the road as one of the town highways, a resolution was passed at a town meeting "not to accept the road." *Held*, that this did not effect a discontinuance of said highway. *Id.*
11. A town meeting has no power to discontinue a highway once established; that can be done only by the intervention of the authorities, and according to the procedure prescribed by statute. (1 R. S. 502, § 8.) *Id.*
12. The primary and dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. *Hudson River Telephone Co. v. Watervliet Tpke. & R. Co.* 898
13. The fact that inconvenience or loss results to one, having no easement in a street, from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of the street, does not, in the absence of a statute imposing a liability, give a right of action. *Id.*

HUDSON RIVER.

See COMMISSIONERS OF LAND OFFICE.

HUSBAND AND WIFE.

1. Under the provisions of the Married Women's Act (Chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849, and chap. 172, Laws of 1862; Code Civ. Pro. § 450), a married woman has such freedom of control over her own real property that a husband cannot, without her consent and against her will, establish and maintain a nuisance upon it, and if she permits him so to do she is liable for the damages occasioned thereby. *Quilty v. Battie*. 201
2. A trespass committed by the wife in the care and management of her separate estate is her independent personal tort for which the husband is not liable, and in an action to recover damages therefor he is not a proper party. *Id.*
3. In an action against a husband and wife to recover damages for injuries occasioned by the bite of a dog, appeared that the husband was the owner of the dog, but kept it upon premises owned by the wife, upon which they both resided, she paying the expenses of the household; she knew of the vicious propensities of the dog, but permitted it upon the premises, feeding and caring for it. There was no evidence that the husband had other property upon the premises; that he was in possession as her tenant and had the care and management of his wife's property; that he assumed to direct as to the domestic animals to be kept on the place or that he knew of the vicious propensities of the dog, and he was sought to be held liable solely on the ground of his marital liability for the torts of his wife. *Held*, that the wife was properly held liable; but that a judgment against the husband was error. *Id.*

See MARRIED WOMEN.

INJUNCTION.

1. An action of trespass will not lie to recover the damages caused by an injunction, where the court had jurisdiction and power to grant such a writ, and where the

one issued was not wholly void, but was erroneous because not restricted in its operation, and was set aside for that reason; unless the procurement thereof is alleged and proved to have been malicious and without probable cause. *Mark v. Hyatt*. 306

2. *It seems*, where a void injunction order is granted, the mere service thereof is not a trespass, and if the party sought to be restrained voluntarily obeys it, he cannot maintain an action of trespass to recover his damages. *Id.*
3. Defendant, E., brought an action against the firm of which plaintiff was a member for an accounting and for royalties due her under a contract on its part to manufacture, as her licensee, a patented article, and for a cancellation of the license because of nonperformance of the contract, and to enjoin the licensees from further manufacturing under the license. By the judgment an accounting and revocation of the license was ordered and an injunction granted which perpetually restrained the licensees from manufacturing the patented article. A copy of this judgment was served on the licensees May 1, 1883. They obeyed the injunction, but appealed from the judgment, and on June fifth obtained an order staying proceedings. The judgment was modified on appeal by striking out the portion awarding an injunction (17 J. & S. 375). In an action of trespass plaintiff sought to recover his damages because of ceasing to manufacture during the interval between the service of copy judgment and the obtaining of the stay. The complaint was dismissed. *Held*, no error; that no trespass was established. *Id.*

—When court has discretion to deny relief by injunction and leave party to action at law.

See *Hughes v. Brigham*. 347

INSURANCE (FIRE).

1. A policy of fire insurance contained a condition that if the assured were not the sole owners of

the property insured, or did not have title to the land on which it was situated in fee simple, and this fact was not expressed in the policy, it should be void. The assured held the land under a contract of purchase; this fact was not expressed in the policy, but had been communicated to a clerk of the general agent of the insurer who had been sent to make an examination of the premises preliminary to the risk. In an action upon the policy, *held*, that notice to the sub-agent while so engaged in soliciting the insurance was notice to the company, and bound it to the same extent as though it had been given directly to the agent himself; and so, that the policy was not avoided by the condition. *Carpenter v. Ger. Am. Ins. Co.* 298

2. The policy provided for immediate notice of loss, and that a particular account thereof should be rendered to the company. It appeared that notice of the fire was given by plaintiff to the company on the day it occurred. A few days after adjusters examined the premises, and experts were employed to make estimates of the value of the property burned. When this, after considerable delay, was accomplished, an insurance man was employed to prepare formal proofs; he delayed doing so for about a month. The principal plaintiff was called away several times on important business, and was unable to give his personal attention to preparing and forwarding the proofs. They were not received by defendant until 115 days after the fire. After receiving them defendant insisted upon examining, and did examine, said plaintiff under oath upon matters relating to the loss. *Held*, that plaintiff was required to serve the proof of loss within a reasonable time; but under the circumstances it could not be decided as a matter of law that the delay was unreasonable; and that the question was properly submitted to the jury. *Id.*

3. Also *held*, that the insistence of defendant upon the right to ex-

amine plaintiff after service of proof of loss was a waiver of any objection founded on the delay. *Id.*

4. The contract of purchase was with a bank. K., its president, held the title for the benefit of the bank; the conveyance having been made to him because of a statute of Pennsylvania, in which state the premises were situated, forbidding foreign corporations from acquiring and holding real estate in that state. This was forgotten by its officers when the contract was made, and K. advised and consented to the contract. *Held*, that while the bank did not have the legal title it was the beneficial owner, and, conceding it could not, in view of said statute, have established a trust in its favor enforceable against K., that a suit in equity could have been maintained by plaintiffs on performance of the contract on their part, against the bank and K. to compel a conveyance of the land; and, therefore, that plaintiff had an insurable interest in the property. *Id.*

See MUTUAL BENEFIT ASSOCIATIONS.

INSURANCE (LIFE).

1. Defendant issued a certificate of membership to plaintiff's husband insuring his life; the amount to be paid to her upon his death. By the certificate and the constitution and regulations of the order a failure to pay dues and assessments rendered the certificate void. In an action upon the certificate defendant claimed a forfeiture because of failure to pay certain assessments. It appeared that plaintiff paid the assessments in question to the wife of the secretary of the subordinate council, to which her husband belonged, at the residence of said secretary. By defendant's constitution it is made the duty of the secretary of a subordinate council to receive all assessments, and the council may permit him to select an assistant for whose acts he is responsible, and there was no provision requiring assessments to be paid to him in person.

It appeared that it had been the common practice for members of the council to pay dues and assessments to the secretary's wife in his absence; he had no office and payments to him or his wife were made at his residence; so far as appeared no question had been raised as to the authority of the wife to receive such payments.

Held, that the absence of any dissent on the part of the council or its officers justified the conclusion that the uniform practice proved was known to and approved by the council; that the secretary's wife was virtually his assistant in receiving assessments; and so, a finding that the assessments were paid was justified. *Anderson v. S. C. O. of C. F.* 107

2. Defendant's constitution provides that no claim for any benefit shall be paid, until complete proof of its justness has been made in accordance with its laws and regulations; the subordinate councils are the delegated agencies of the supreme council, and the general scheme as disclosed by the relief fund laws is to impose upon said councils the duty of investigating a death claim and to prepare and forward to the supreme council proofs of death according to prescribed forms. Plaintiff proved that shortly after her husband's death she called upon the secretary of the subordinate council and presented to him the physician's certificate of the death, and also called upon the councilor of the lodge and was assured by both "that everything would be all right." *Held*, that no definite duty was imposed upon plaintiff to furnish proofs of death, as in the case of ordinary life insurance; and that she was not required to do more than to notify the officer of the subordinate council of her husband's death as she did. *Id.*

3. A corporation organized under the act of 1883 (Chap. 175, Laws of 1883), providing for the incorporation of co-operative life and casualty insurance companies, has no power to receive, as members, infants of such tender years that they are unable to exercise any

choice in becoming members or to exercise the powers with which members are invested under the act. *In re Globe M. B. Assn.* 280

4. *It seems* that the act simply provides for the voluntary association of persons capable of acting in the administration of the affairs of the corporation and of appointing beneficiaries; as, therefore, the law fixes an arbitrary period when persons become clothed with general legal capacity, only persons of full age may become members. *Id.*

5. The statement, in an application for life insurance, of the age of the applicant is material. *Preuster v. S. U. O. C. F.* 417

6. In an application by R. for membership in defendant's order the applicant stated his age to be sixty years, and that any untrue or fraudulent statement therein would forfeit the applicant's rights to any benefits. The certificate issued to him stated that it was subject to the conditions set forth in the application for membership. In an action upon the certificate it appears that it was the custom of the order not to accept as a member one over sixty, and that R. was at least sixty-one at the time of his application, *held*, that the false statement was material, and in the absence of a waiver of the forfeiture, the action was not maintainable. *Id.*

7. A rumor that the statement was false reached the secretary of defendant's local council about a year after the issue of the certificate, but not from a reliable or authentic source, and without any proof as to its correctness. About two years thereafter, upon application by R. for an allowance on account of disability, a committee was appointed to investigate and ascertain the truth of the rumor. The committee procured from Saxony where R. was born a certificate of his birth which showed that his statement was false, and thereupon reported in favor of his expulsion, and fifteen days thereafter the council heard the

report read, and voted to expel him. No assessments were collected from R. thereafter, but one or more were collected by the secretary, who was a member of the committee, between the receipt by it of the certificate and its report. Said certificate was held below to be incompetent as evidence, and the proof on the trial contradicted it as to the exact date of R.'s birth. *Held*, the facts did not establish a waiver.

Id.

8. Under the provision of the act regulating the forfeiture of life insurance policies (Chap. 341, Laws of 1876, as amended by chap. 321, Laws of 1877), which requires notice to be given in the manner and as specified, before a policy may be declared forfeited, where a policy is out of the ordinary form, a notice which contains statements reminding the assured of the time and place when and where to make any payments required by the terms of the contract, the amount thereof and the effect of nonpayment is sufficient, although it does not follow literally the words of the statute. *McDougall v. Provident S. L. As. Soc.* 551

- 9 Defendant issued a policy insuring the life of McD. for one year from July 23, 1884. The policy contained an agreement on the part of defendant "to renew and extend this insurance during each successive year" upon condition that the assured pay, on or before July twenty-third in each year, a "mortality premium" and a specified "expense charge." In an action upon the policy, it appeared that a notice was seasonably mailed by defendant to the assured prior to July 23, 1888; this stated the amount to be paid, the place where, and the person to whom the payments were to be made; that they would become due and payable on that date, and that "in order to continue and extend the insurance, it will be necessary that the payments required for that purpose shall be paid on or before the date above mentioned as stipulated in the policy contract." The payments were not made, and the assured

died in November of that year. *Held*, that the notice was a sufficient compliance with the statute; and that plaintiffs were not entitled to recover. *Id.*

INTEREST.

1. Interest may legally be allowed by a jury, in its discretion, in estimating the amount of damages sustained by the plaintiff through an injury to his property caused by the negligence of the defendant. The interest may be computed on the amount of the depreciation in value of the property. *Wilson v. City of Troy.* 96
2. The distinction in this respect between actions sounding in tort, and actions to recover unliquidated damages on contract pointed out. *Id.*
3. A trustee is not chargeable with interest solely because he deposits the trust moneys with his own, or uses them in his business, there must be in addition a breach of trust, a neglect or refusal to invest the fund at the time, or in the manner the trust instrument or the law points out. *Price v. Holman.* 124

—When properly allowed by Board of Claims.

See Parmenter v. State. 154

—As to proper method of computation of interest.

See Peyser v. Myers. 599

JUDGES.

- A judge, at chambers, has no jurisdiction, either in the city of New York or elsewhere in the state, to issue a writ of mandamus. *People ex rel. v. Donovan.* 76

JUDGMENT.

1. Where after judgment in a foreclosure suit, for foreclosure and sale, containing the usual provision for a deficiency judgment, and pending an appeal therefrom the mortgaged premises were sold

- under a judgment of foreclosure and sale in an action to foreclose a prior mortgage thereon, to which action the parties to the first action were made parties, which sale left a surplus which, upon application of the plaintiff in the first action, was applied upon his judgment, leaving a deficiency, *held*, that he was entitled to a judgment for such deficiency; that for the purposes of his lien the surplus took the place of the mortgaged property, and the application thereof upon his judgment took the place of and was in lieu of a sale. *Frank v. Davis*. 275
2. Where a judgment is entered for a debt justly due and owing, the fact that it was entered upon an offer to allow it, does not render it collusive in any sense which allows another creditor to interfere. *Columbus Watch Co. v. Hodenpyl*. 430

JUDICIAL SALES.

The court has power on motion to relieve a purchaser on sale under judgment in a foreclosure suit, and where facts are shown sufficient to call upon the court to exercise its discretion, its determination is not reviewable here. *Crocker v. Gollner*. 662

JURISDICTION.

1. A judge, at chambers, has no jurisdiction, either in the city of New York or elsewhere in the state, to issue a writ of mandamus. *People ex rel. v. Donovan*. 76
2. Even if the application for the writ is a motion within the Code of Civil Procedure (§ 768), it is taken out of the operation of the provision (§ 770) declaring that in the first judicial district a motion which elsewhere must be made in court may be made to a judge out of court, by the provision (§ 2068) declaring that the writ can only be granted at Special Term, save in the cases where it is directed to be granted at General Term (§ 2069). *Id.*
3. Where, therefore, on the day of a general election one of the justices of the Supreme Court, upon application made to him at chambers, issued a peremptory writ of mandamus commanding inspectors of election to permit the relator to take the disability oath provided in the election law, and upon taking the oath to retire with a person of his selection to a booth for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared, and where, upon due proof of service of the writ upon the inspectors, and their refusal to obey it, an order was made adjudging one of them guilty of contempt, and imposing upon him a punishment therefor. *Held*, that the justice had no jurisdiction to issue the writ; and so, that disobedience thereto could not be punished as a contempt. *Id.*
4. Where a court in equity obtains jurisdiction for the purpose of an injunction and is in full possession of the merits it may, although the relief asked cannot properly be granted, retain the suit in order to do complete justice between the parties and administer such other equitable relief as the merits of the case justify. *Mott v. Oppenheimer*. 312
5. *It seems* that an action *quare clausum fregit* is local in its character, and the courts of this state have no jurisdiction where the trespass is upon lands in another state. *Barrett v. Palmer*. 336
6. The power of the federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state and separate a part of its territory from its jurisdiction, and the jurisdiction and authority of the state over lands so acquired by the United States by the exercise of the power of eminent domain, remains unchanged, except so far as their use for the purposes for which they were required necessarily removes them from the domain of state authority. *Id.*
7. The state may cede to the United States political jurisdiction over

such lands, in which case congress may legislate in regard to them.

Id.

8. In such case, however, until congress makes new regulations touching the administration of justice in civil actions arising in the territory, the municipal law of the state controls and remains unchanged.

Id.

9. As to whether even where congress has exercised this power, the state courts would be powerless to redress private injuries committed on the territory *quære*.

Id.

10. In an action of trespass brought in the City Court of Brooklyn, it appeared that the *locus in quo* was originally part of the Brooklyn navy yard, belonging to the United States, political jurisdiction over which, with certain reservations, was ceded by this state to the United States. (Chap. 355, Laws of 1853.) Congress has not legislated in reference to civil actions arising in the territory. The federal authorities leased part of the lands, including the *locus in quo*, or permitted the city to use it for a market. The city leased it, and plaintiff was in possession as subtenant. Defendant moved to dismiss the complaint on the ground that the trespass complained of was upon land belonging to the United States, and that the court had no jurisdiction. This motion was denied. *Held*, no error.

Id.

LANDLORD AND TENANT.

See LEASE.

LEASE.

1. By the terms of a lease of premises used as a brickyard, the lessee, aside from the payment of rent as stipulated, covenanted to make certain additions and improvements, so as to constitute, when completed, "a proper and substantial brickyard upon the whole of the demised premises," to keep up and maintain the same, and to leave all these improvements, as well as those found upon the prem-

ises when said lessee took possession, in good condition, and to preserve the property from deterioration. The lessee sublet the premises to parties who were in possession under a former lease, and owned certain machinery and fixtures then on the premises; these, and also some fixtures and machinery thereafter put upon the premises were removed at the end of the term. In an action to recover damages for breach of the covenants, *held*, that they bound the lessee to furnish all things necessary to a brickyard, such as was described, and to leave them upon the premises, and also to provide against deterioration by natural wear and damage of the elements; that defendant was liable in damages for the articles removed, and also for failure to furnish and put upon the premises those required to fulfill the requirements of the lease. *Scott v. Haverstraw C. & B. Co.* 141

2. Among other things defendant covenanted to put upon the premises a steam engine of sufficient horse-power and capacity for the purposes of the brickyard. Defendant furnished an engine of less capacity than that called for, which it left upon the premises. It did not appear that plaintiff ever used it or had the benefit of its use. *Held*, that the referee properly considered the case as if no engine had been furnished, and allowed the value of an engine such as was called for. *Id.*

3. Defendant also covenanted to leave the surface of the yard in a smooth condition; this it failed to do. *Held*, that defendant was liable for breach of this covenant, and the fact that subsequent to the making of the lease other methods of making brick had been devised which rendered a smooth surface unnecessary, did not change the construction to be put upon the covenant or defendant's liability under it. *Id.*

LEGACY.

To uphold a legacy by implication, the inference from the will of the

testator's intention to give the legacy must be such as to leave no hesitation in the mind of the court, and to permit of no other reasonable inference. *Bradhurst v. Field*.

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LEGATEES.

1. Where the income of an estate or of a designated portion thereof, is given to a legatee for life he becomes entitled to whatever income accrues thereon from and after the death of the testator, unless there is some provision in the will from which a contrary intent can be inferred, and the legatee may require the executor to account to him from that time. *In re Stanfield*. 292
2. To such a case the rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary or of administration, has no application. *Id.*
3. The time of payment, however, is not affected and the legatee must wait therefor until the expiration of one year from the granting of letters. *Id.*
4. Where, therefore, the will of S. directed his executor to invest \$20,000 in a manner specified and pay over the income to his son for life, and at his death the principal to another, and it appeared that the corpus of the estate was so invested at the time of the testator's death as to produce income, *held*, that the son was entitled to the income from the death of the testator although not to its payment until a year from the granting of letters testamentary; that although the executor had a year in which to make the investment directed, as the gift of the income was wholly independent of the gift of the principal, the right to the former did not depend upon the investment, and whatever income arose from the principal until the investment was made, as directed, belonged to the legatee to whom it was expressly given. *Id.*

LEGISLATURE.

1. Under the provisions of the State Constitution (Art. 3, §§ 4, 5) providing for an enumeration of the inhabitants of the state in 1855, and at the end of "every ten years thereafter," and for an alteration of the senate districts and apportionment of members of assembly at "the first session after the return of every enumeration," the power to make the alteration and apportionment is not limited to regular sessions; but when, after the adjournment of the regular session at which an enumeration bill is passed, and after an enumeration thereunder, an extraordinary session is called by the governor, and he recommends this subject for consideration, such a session is the "first session" within the meaning of said provision, and the legislature so in session has power to make the changes and apportionment. *People ex rel. v. Rice*. 473
2. Where the first legislature, convened at the expiration of a ten years' period, fails to perform the duty imposed upon it directing an enumeration, the power to direct it is not lost until the recurrence of another ten years' period, but the duty devolves upon the next and each succeeding legislature until the constitutional mandate is obeyed. *Id.*
3. The amendments to the State Constitution, made in 1874, which struck out the provisions denying to a colored person the right to vote, who had not the prescribed property qualification, and relieving all those not so qualified from direct taxation (Art. 2, § 1), and which omitted from the provision in reference to the apportionment of members of assembly, the clause excluding from the enumeration "persons of color not taxed" (Art. 3, § 5), had the effect to abrogate and strike out the similar words in the provision relating to the reorganization of senate districts. *Id.*
4. The constitutional provision (Art. 3, § 4) vesting in the legislature the power to alter the senate dis-

tricts after after each enumeration, and requiring this to be done so that "each senate district shall contain, as near as may be, an equal number of inhabitants," etc., grants to the legislature a discretion in carrying out the power, and the court has no jurisdiction to review the exercise of this discretion, unless it appears that it has been plainly and grossly abused (ANDREWS and FINCH, JJ., dissenting).

LIENS.

The priority of lien of firm creditors cannot be affected by a transfer by an insolvent firm of assets to one or more of the partners, or by the withdrawal of one partner from the firm or the introduction of a new member. *Peyser v. Myers*. 599

See FORECLOSURE. MORTGAGE.

LIMITATION OF ACTIONS.

1. While a statute limiting the time in which to bring an action upon contract is held to affect only the remedy, not the obligation, this is with the proviso that a reasonably sufficient time is left in which a party may after the passage of the act commence his action. *Parmenter v. State*. 154
2. A statute cutting down the right to commence an action upon a cause of action then existing, from a period without limitation to a few months after the passage of the act, does not give such reasonable time; and so, is unconstitutional. *Id.*
3. The act of 1886 (Chap. 572, Laws of 1886), requiring actions against "the mayor, aldermen and commonalty of any city" having fifty thousand inhabitants or over, for damages for personal injuries arising from its alleged negligence, to be commenced within one year after the cause of action accrued, and notice of the intention to commence such action and of the time and place at which the injuries

were received, to be filed with the counsel to the corporation within six months after such cause of action shall have accrued, is not limited to a city having as its corporate name "the mayor, aldermen and commonalty," but applies to all cities of the prescribed size, and is imperative. *Curry v. City of Buffalo*. 366

4. The fact that a city charter requires that claims for such damages shall be presented to the common council for its consideration does not excuse a noncompliance with said act of 1886; the two requirements are not inconsistent. *Id.*

MANDAMUS.

1. A judge, at chambers, has no jurisdiction, either in the city of New York or elsewhere in the state, to issue a writ of mandamus, *People ex rel. v. Donoan*. 76
2. Even if the application for the writ is a motion within the Code of Civil Procedure (§ 768), it is taken out of the operation of the provision (§ 770) declaring that in the first judicial district a motion which elsewhere must be made in court may be made to a judge out of court, by the provision (§ 2069) declaring that the writ can only be granted at Special Term, save in the cases where it is directed to be granted at General Term (§ 2069). *Id.*
3. Where, therefore, on the day of a general election one of the justices of the Supreme Court, upon application made to him at chambers, issued a peremptory writ of mandamus commanding inspectors of election to permit the relator to take the disability oath provided in the election law, and upon taking the oath to retire with a person of his selection to a booth for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared, and where, upon due proof of service of the writ upon the inspectors, and their refusal to obey it, an order was made adjudging one of them guilty of contempt, and imposing upon him a punish-

ment therefor. *Held*, that the justice had no jurisdiction to issue the writ; and so, that disobedience thereto could not be punished as a contempt. *Id.*

4. Under the provision of the "Reform Ballot Law" (§ 81, chap. 262, Laws of 1890, as amended by chap. 296, Laws of 1891), providing for the determination by mandamus of the question as to the validity of a ballot claimed to be invalid, and prescribing the steps to be taken preliminary to the proceeding, the fact that the inspectors failed to write their names upon the ballot, will not alone, when the other prescribed steps have been taken, prevent or defeat the mandamus proceeding. *People ex rel. v. Bd. Suprs.* 522

5. *It seems* that where, during or immediately after the completion of a canvass, a marked ballot is questioned as prescribed by the act, and a proceeding by mandamus is instituted as provided for, it is for the court to determine whether, under the circumstances of the particular case, there has been such a substantial compliance with the other requirements as to enable the relator to maintain the proceeding. *Id.*

6. *It seems* that a candidate, intending to proceed by mandamus, should procure an alternative writ. *Id.*

7. Where, however, a peremptory writ is applied for upon notice as required (Code Civ. Pro. § 2970), if the facts upon which the application is based are admitted, or not disputed, and are sufficient to authorize the writ, questions of law only are involved, and the writ may issue in the first instance. *Id.*

8. Where a peremptory writ is issued, it must command precisely what, and no more than the party to whom it is directed, is legally required to do; if it requires more, while the court on application to quash may amend (Code Civ. Pro. §§ 721, 722, 723, 1997), it may, in its discretion, quash the writ, and the exercise of this discretion is not reviewable here. *Id.*

9. Where, therefore, the affidavits upon motion for a mandamus under said act set forth facts showing clearly that a portion of the ballots which were questioned, were marked for the purpose of identification, which facts were not disputed; but the facts stated as to the residue failed to show that the ballots were so marked, and there was no allegation that they were questioned during the canvass, and a peremptory writ was issued requiring the board of county canvassers to recount the votes and reject all those questioned, which writ was quashed; *held*, that the writ was defective in that it required too much; and that the order quashing it was not reviewable here. *Id.*

10. The writ was granted without notice to the board of canvassers, it appeared, and without objection made return submitting to the jurisdiction of the court. *Held*, that the objection of want of notice was only to be taken by the board and after such appearance and return it was too late for it to raise it. *Id.*

MARRIED WOMEN.

See DOWER.

HUSBAND AND WIFE.

MASTER AND SERVANT.

1. The owners of a vessel are not liable in damages for the willful and malicious acts of its master in assaulting and injuring a seaman while upon the high seas; such an act being of a criminal nature, is not in violation of any duty imposed upon the owners by maritime law, and the doctrine of *respondet superior* has no application. (MAYNARD, FINCH and O'BRIEN, JJ., dissenting.) *Gabrielson v. Waydell.* 1

2. The master and seamen of a vessel are engaged in a common employment and are fellow-servants, although of different grades, and while the master in rendering to the seaman that care and in performing those duties imposed upon

its owners by the maritime law represents them, and for a neglect of duty in these respects they are liable, in all matters outside the scope of the master's employment, and without the authority committed to him by maritime law, his misconduct is a risk assumed by the seaman, for the consequences of which the owners are not responsible. *Id.*

MIDDLETOWN (CITY OF).

The charter of the city of Middletown (§ 5, tit. 4, chap. 535, Laws of 1888) requires the assessors to make up the assessment-roll, give notice of the meeting for hearing of grievances, correct the roll and deliver it to the city clerk on or before the third Tuesday of July. Upon an application, under said act of 1880, for a certiorari to review the action of the assessors of said city in assessing the property of the relator for the year 1891, it appeared that on June eighteenth, they gave notice that they had completed the roll and left a copy of it with the city clerk, where it could be examined until July tenth, when they would meet to review the assessments on application of any one aggrieved. The assessors met on July tenth, heard complaints, and on July sixteenth swore to the roll and filed it with the city clerk; on the same day the common council adopted a resolution confirming it. It did not appear that any notice of the final completion and delivery of the roll was given. *Held*, that the relator was not concluded by the action of the common council; and that, in the absence of notice, the time for applying for the writ was unlimited. *In re Corwin.* 245

MORTGAGE.

1. The title of the mortgagor of real estate is not changed by the mortgage, and although the mortgagee goes into possession by a surrender from the mortgagor, the fee still remains in the latter. *Sexton v. Breeze.* 387
2. The owner of a farm, upon which was a mortgage held by plaintiff,

sold to defendant a crop of wheat thereon, the bill of sale giving to him the right to secure and harvest the crop. Subsequently said owner executed to plaintiff a written instrument, wherein he authorized the latter to take possession of the farm, rent the same and apply the proceeds on the mortgage. Defendant went upon the farm to cut the wheat, but was prevented from so doing by plaintiff, who harvested it, but defendant entered and carried it away. In an action of replevin, *held*, that conceding plaintiff to be in the position of a mortgagee in possession, still defendant, as purchaser, owned the crop of wheat and had the right of ingress to gather and carry it away; and so, that the action was not maintainable. *Id.*

3. Where it appears from an instrument, when construed in its entirety, that it was intended as a security for a debt, although there is no express provision that upon the fulfillment of the condition, the conveyance shall be void, it is a mortgage and if the amount secured is left indefinite and uncertain, this may be shown by any competent proof *dehors* the instrument. *Burnett v. Wright.* 543
4. An instrument which plaintiff sought to reform and to foreclose as a mortgage was in the usual form of a real estate mortgage; it was signed, sealed, and was duly acknowledged and recorded as a mortgage; it recited a money consideration of \$600; it contained a defeasance clause as follows: "This grant is intended as security for the payment of the sum of — in one year from the date of this instrument with interest semi-annually, and this conveyance shall be void if such payment is made as herein specified." The court held that the amount intended to be secured could not be shown by parol and that the mortgage was void for uncertainty; that an action to foreclose could not be maintained without a reformation of the instrument, and that an action to reform was barred by the Statute of Limitations and so dismissed

the complaint. *Held*, error; that plaintiff was entitled to prove by parol the amount intended to be secured; also that the instrument, without correction or reformation, was a valid mortgage and enforceable as such, as in the absence of other proof, it may be presumed that the consideration expressed, correctly represents the sum secured. *Id.*

5. Where a committee of railroad mortgage bondholders appointed on foreclosure sale of the mortgaged property, for the purpose of effecting a reorganization, enter into a contract within the scope of the authority given to them, an action to have the contract adjudged null and void is not sustainable, in the absence of any claim of fraud on the part of those contracting with the committee or participation on their part in some fraud of the committee; it is not sufficient to aver conduct on the part of the latter which might as between them and the bondholders amount to a violation of their trust duties. *Brooks v. Dick.* 652

See FORECLOSURE.

MUNICIPAL CORPORATIONS.

1. To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state and through it by the municipality which governs and controls the port. *In re Mayor, etc.* 253
2. The only standard by which to judge of the extent of the duty is the necessities of the business. *Id.*
3. Where a permanent pier and an exclusive right to its use is a necessity of large steamship lines, without which business cannot properly be transacted, the duty rests upon the state or the municipality to provide such accommodations or to permit the companies to obtain them from private owners. *Id.*
4. Where this duty has been imposed by the state upon a municipality and it has undertaken its performance, all appropriate acts done by it in such performance are for a public purpose. *Id.*
5. Lands therefore required by a municipality, upon which such a duty has been imposed, for the construction of piers and wharves are required for a public use and may be taken under the right of eminent domain, although some portion may thereafter in the discretion of the municipality be divided off and placed in the exclusive possession of a lessee, to be used solely in the transaction of necessary business connected with the transportation of passengers and freight. *Id.*
6. A municipality by commencing proceedings under its charter to acquire land for the purposes of a street admits the landowner's right, and it may not claim in such proceedings that the land has been dedicated by the owner to the public use as a highway. *In re Village of Olean v. Steyner.* 341
7. The act of 1886 (Chap. 572, Laws of 1886), requiring actions against "the mayor, aldermen and commonalty of any city" having fifty thousand inhabitants or over, for damages for personal injuries arising from its alleged negligence, to be commenced within one year after the cause of action accrued, and notice of the intention to commence such action and of the time and place at which the injuries were received, to be filed with the counsel to the corporation within six months after such cause of action shall have accrued, is not limited to a city having as its corporate name "the mayor, aldermen and commonalty," but applies to all cities of the prescribed size, and is imperative. *Curry v. City of Buffalo.* 366
8. The commencement of the action cannot be considered as such notice as the filing thereof is a condition precedent to its maintenance. *Id.*
9. The whole matter of the maintenance of this class of actions is

within the control of the legislature. *Id.*

10. The fact that a city charter requires that claims for such damages shall be presented to the common council for its consideration does not excuse a noncompliance with said act of 1886; the two requirements are not inconsistent. *Id.*

11. Public officers or a municipality charged with the conduct of a work of a public improvement, where they have acted in good faith and are not chargeable with any neglect, default or unlawful act, are not responsible to a property owner because the work has not resulted in such benefits to him as were anticipated, or because it does not answer all the purposes for which it was projected. *Garrett v. Trustees, etc.* 486

See BUFFALO (CITY OF).
CANANDAIGUA (VILLAGE OF).
MIDDLETOWN (CITY OF).
NEW YORK (CITY OF).
PORT CHESTER (VILLAGE OF).
TROY (CITY OF).

MURDER.

— *As to sufficiency of evidence to sustain indictment for murder in the first degree.*

See *People v. McGuire* (Mem.). 689

MUTUAL BENEFIT ASSOCIATIONS.

1. Defendant issued a certificate of membership to plaintiff's husband insuring his life; the amount to be paid to her upon his death. By the certificate and the constitution and regulations of the order a failure to pay dues and assessments rendered the certificate void. In an action upon the certificate defendant claimed a forfeiture because of failure to pay certain assessments. It appeared that plaintiff paid the assessments in question to the wife of the secretary of the subordinate council, to which her husband belonged,

at the residence of said secretary. By defendant's constitution it is made the duty of the secretary of a subordinate council to receive all assessments, and the council may permit him to select an assistant for whose acts he is responsible, and there was no provision requiring assessments to be paid to him in person. It appeared that it had been the common practice for members of the council to pay dues and assessments to the secretary's wife in his absence; he had no office and payments to him or his wife were made at his residence; so far as appeared no question had been raised as to the authority of the wife to receive such payments. *Held*, that the absence of any dissent on the part of the council or its officers justified the conclusion that the uniform practice proved was known to and approved by the council; that the secretary's wife was virtually his assistant in receiving assessments; and so, a finding that the assessments were paid was justified. *Anderson v. S. C. O. C. F.* 107

2. Defendant's constitution provides that no claim for any benefit shall be paid, until complete proof of its justness had been made in accordance with its laws and regulations; the subordinate councils are the delegated agencies of the supreme council, and the general scheme as disclosed by the relief fund laws is to impose upon said councils the duty of investigating a death claim and to prepare and forward to the supreme council proofs of death according to prescribed forms. Plaintiff proved that shortly after her husband's death she called upon the secretary of the subordinate council and presented to him the physician's certificate of the death, and also called upon the councilor of the lodge and was assured by both "that everything would be all right." *Held*, that no definite duty was imposed upon plaintiff to furnish proofs of death, as in the case of ordinary life insurance; and that she was not required to do more than to notify the officer of the subordinate council of her husband's death as she did. *Id.*

3. A corporation organized under the act of 1883 (Chap. 175, Laws of 1883), providing for the incorporation of co-operative life and casualty insurance companies, has no power to receive, as members, infants of such tender years that they are unable to exercise any choice in becoming members or to exercise the powers with which members are invested under the act. *In re Globe M. B. Assn.* 280
4. *It seems* that the act simply provides for the voluntary association of persons capable of acting in the administration of the affairs of the corporation and of appointing beneficiaries; as, therefore, the law fixes an arbitrary period when persons become clothed with general legal capacity, only persons of full age may become members. *Id.*
5. In an application by R. for membership in defendant's order the applicant stated his age to be sixty years, and that any untrue or fraudulent statement therein would forfeit the applicant's rights to any benefits. The certificate issued to him stated that it was subject to the conditions set forth in the application for membership. In an action upon the certificate it appears that it was the custom of the order not to accept as a member one over sixty, and that R. was at least sixty-one at the time of his application, *held*, that the false statement was material, and in the absence of a waiver of the forfeiture, the action was not maintainable. *Fruester v. S. C. O. C. F.* 417
6. A rumor that the statement was false reached the secretary of defendant's local council about a year after the issue of the certificate, but not from a reliable or authentic source, and without any proof as to its correctness. About two years thereafter, upon application by R. for an allowance on account of disability, a committee was appointed to investigate and ascertain the truth of the rumor. The committee procured from Saxony where R. was born a certificate of his birth which showed that his statement was false, and thereupon reported in favor of his expulsion, and fifteen days thereafter the council heard the report read, and voted to expel him. No assessments were collected from R. thereafter, but one or more were collected by the secretary, who was a member of the committee, between the receipt by it of the certificate and its report. Said certificate was held below to be incompetent as evidence, and the proof on the trial contradicted it as to the exact date of R.'s birth. *Held*, the facts did not establish a waiver. *Id.*

NEGLIGENCE.

1. Where one is injured by the neglect of a city to properly guard a place in its street made dangerous by its own act, it is not essential to show notice to it of its defect. *Wilson v. City of Troy.* 96
2. The act of 1886 (Chap. 572, Laws of 1886), requiring actions against "the mayor, aldermen and commonalty of any city" having fifty thousand inhabitants or over, for damages for personal injuries arising from its alleged negligence, to be commenced within one year after the cause of action accrued, and notice of the intention to commence such action and of the time and place at which the injuries were received, to be filed with the counsel to the corporation within six months after such cause of action shall have accrued, is not limited to a city having as its corporate name "the mayor, aldermen and commonalty," but applies to all cities of the prescribed size, and is imperative. *Curry v. City of Buffalo.* 366
3. The commencement of the action cannot be considered as such notice, as the filing thereof is a condition precedent to its maintenance. *Id.*
4. The whole matter of the maintenance of this class of actions is within the control of the legislature. *Id.*
5. The fact that a city charter requires that claims for such dam-

ages shall be presented to the common council for its consideration does not excuse a noncompliance with said act of 1886; the two requirements are not inconsistent.

Id.

6. In an action by plaintiff, as administrator of the estate of M., to recover the balance of a deposit account with defendant, as such administrator, the latter pleaded payment, and proved that said balance had been paid to one K., a person unknown to defendant's officers, upon presentation by him of the pass book, together with a paper purporting to be a power of attorney, executed by plaintiff in his individual capacity, wherein he was described as executor of the will of P., and which although it gave the correct number of the pass book, by its terms authorized K. to draw all moneys on deposit with defendant credited to plaintiff as such executor. It appeared that K. obtained possession of the pass book and procured plaintiff's signature to the power of attorney by fraud. Plaintiff's counsel requested the submission to the jury of the question as to whether defendant acted with ordinary care and diligence in making such payment, which was refused. *Held*, error; that as the alleged power of attorney, upon its face, did not relate to the deposit in question, and conferred no power upon K. to draw the money, or upon defendant to pay it to him, this might furnish reasonable grounds for suspicion and, under the circumstances, the question of defendant's negligence should have been submitted to the jury. *Gearns v. Bowery S. Bank.* 557

7. In the absence of a statute imposing upon a railroad company the duty of ringing bells or blowing whistles upon locomotives approaching a crossing, the failure to give such signals is not, as matter of law, negligence. *Vanderwiter v. N. Y. & N. E. R. R. Co.* 583

8. The provision of the General Railroad Act (§ 39, chap. 140, Laws of 1850; § 7, chap. 282, Laws of 1854), imposing that duty, having

been repealed by the act of 1886 (Chap. 593, Laws of 1886); the only statute upon the subject remaining is the provision of the Penal Code (§ 421), which provides that the engineer of a locomotive who fails to ring the bell or sound the whistle upon it, eighty yards from a crossing, shall be guilty of a misdemeanor; this imposes no duty upon the company. (MAYNARD, J., dissenting as to last proposition.) *Id.*

9. *It seems*, however, a railroad company owes a duty to the public to run its trains with care and caution at crossings, and the failure to give due warning of an approaching train by the signals specified or in some other way, may properly be considered as bearing upon the question of negligence. *Id.*

10. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, who, while crossing defendant's tracks at a farm crossing, was struck and killed by a locomotive moving at a very high rate of speed, plaintiff gave evidence tending to show that no bell was rung or whistle blown for a highway crossing two thousand feet from the farm crossing, or when the engine passed a depot sixteen hundred feet therefrom, and that it was the custom of enginemen or firemen to give either one or other of these signals at both those places. The court charged that it was the duty of defendant to blow the whistle or sound the bell eighty rods before reaching the highway and continue it at intervals until the crossing was passed, and that if it did not do this and the accident at the farm crossing was occasioned by that omission, the jury might find a verdict of negligence, the same as if said provisions of the Railroad Act had not been repealed. *Held*, error. *Id.*

NEW YORK (CITY OF).

1. The provision of the New York Consolidation Act (§ 715, chap. 410, Laws of 1882) authorizing the department of docks to acquire for the benefit of the city title, by

proceedings *in invitum*, to any and all wharf property in the city not owned by it included in the plans adopted in pursuance of the provisions of the act of 1870 (Chap. 187, Laws of 1870), as amended by the act of 1871 (Chap. 754, Laws of 1871), is not rendered unconstitutional by the fact that the city is authorized in its discretion to lease its piers or to give the exclusive use of some of them for special kinds of commerce (§ 716). *In re Mayor, etc.* 253

2. Under the New York Consolidation Act (§§ 879, 908, chap. 410, Laws of 1882) an assessment for a local improvement in said city can only be vacated or modified, through the affirmative action of the landowner, by resort to the special remedy therein provided; and this, although the assessment is void. *People ex rel. v. Myers.* 465

8. Accordingly *held*, that a certiorari did not lie to review the action of the board of revision and correction of assessment lists in confirming an assessment. *Id.*

NOTICE.

Under the provision of the Code of Civil Procedure (§ 2576), providing for appeals from surrogates' decrees, an appellant desiring a review upon the facts is not required to so specifically state in his notice of appeal. The grounds of the appeal are not required to be stated, and a notice that the appeal is "from the decree, and each and every part thereof," is sufficient to authorize a review. *In re Stewart.* 418

— *When subsequent grantee chargeable with notice of recorded agreement, granting an interest in the premises.*

See Mott v. Oppenheimer. 312

NUISANCE.

1. A vicious domestic animal, if permitted to run at large, is a nuisance, and a person who, knowing its vicious character, keeps or

harbors it is liable for all damages directly resulting from it. *Quilty v. Battie.* 201

2. Under the provisions of the Married Women's Act (Chap. 200, Laws of 1848, as amended by chap. 875, Laws of 1849, and chap. 172, Laws of 1862; Code Civ. Pro. § 450), a married woman has such freedom of control over her own real property that a husband cannot, without her consent and against her will, establish and maintain a nuisance upon it, and if she permits him so to do she is liable for the damages occasioned thereby. *Id.*

OFFICE AND OFFICER.

Public officers or a municipality charged with the conduct of a work of public improvement, where they have acted in good faith and are not chargeable with any neglect, default or unlawful act, are not responsible to a property owner because the work has not resulted in such benefits to him as were anticipated, or because it does not answer all the purposes for which it was projected. *Garrett v. Trustees, etc.* 436

PARTIES.

1. A trespass committed by the wife in the care and management of her separate estate is her independent personal tort for which the husband is not liable, and in an action to recover damages therefor he is not a proper party. *Quilty v. Battie.* 201
2. *It seems* that under proper allegations and proof, he who owns and he who harbors a vicious animal may both be made responsible in the same action for a resulting injury. *Id.*
3. It is not sufficient that the performance of a covenant by a grantee to a deed may benefit a third person, to entitle the latter to enforce it, but the covenant must have been entered into for his benefit, or such benefit must be the direct result of performance

and so, within the contemplation of the parties, and the grantor must also have a legal interest that the covenant be performed in favor of the party claiming performance. *Durnherr v. Rau.* 219

4. A party not the owner of adjoining uplands and having no grant of lands under the waters of a navigable river, and who, therefore, is not aggrieved by a decision of the commissioners of the land office granting said lands, is not entitled to a review by certiorari of the action of the commissioners. *People ex rel. v. Comrs., etc.* 447

5. Under the Code of Civil Procedure (§ 2538) a Surrogate's Court has power in its discretion, to grant an order directing the issuing of a commission to examine before trial a party to a proceeding pending before it. *In re Plumb.* 661

6. Where a defendant in a criminal action offers himself as a witness, he is subject to the same rules of examination as apply to other witnesses. *People v. McCormick.* 663

See ABATEMENT AND REVIVAL.

PARTNERSHIP.

1. One member of a firm died, leaving a will by which he directed his executors to "conduct his interest in the business" in the firm name in conjunction with the surviving partner; the business was so carried on. Subsequently judgments were recovered against the firm and executions issued thereon. In an action by other creditors, among other things, to set aside said executions, *held*, that the provisions of the Code of Civil Procedure in relation to the issuing of executions against executors did not apply (§§ 1731, 1825, 1826); that as to the fund belonging to the estate, left under the directions of the will invested in the business, the executors became co-partners, and the debts incurred in the business were claims upon the partnership primarily and not upon the testator's general estate; and that the creditors dealing with the new partnership had the usual

rights of partnership creditors. *Columbus Watch Co. v. Hodenpyl.* 430

2. Also *held*, that said provisions did not apply to executions issued upon judgments against the firm which were rendered upon debts originally owing by the old firm, but which had, with the consent of the judgment creditors, been assumed by the new firm. *Id.*

3. An incoming partner is not as of course liable for the prior debts or transactions of the firm; he can be made liable only by an agreement on his part to assume such liability. His becoming a member of the firm creates no presumption of the existence of such an agreement. *Peyser v. Myers.* 599

4. It is not necessary, however, to prove an express agreement; it may be established by evidence of facts and circumstances which justly raise an implication of its existence. *Id.*

5. The priority of lien of firm creditors cannot be effected by a transfer by an insolvent firm of assets to one or more of the partners, or by the withdrawal of one partner from the firm or the introduction of a new member. *Id.*

6. In an action brought by judgment creditors to set aside an assignment made by the firm of H. H. & Co. for the benefit of creditors as fraudulent and void, and to procure the application of moneys paid to certain defendants, in pursuance of a preference therein, to the satisfaction of plaintiffs' judgment, it appeared that prior to February 1, 1882, the then existing firm of H. H. & Co. owed the estate of M. a debt upon which it was paying interest. The firm was then insolvent. On that date a new firm was formed with the same name, one B. becoming a partner. The latter knew of the existence of the debt, but not the amount thereof, and he made no inquiry; he contributed no capital, and the new firm had none except the stock and assets of the old firm, and the business was conducted after he became a member precisely as before. The debt

to the estate was credited to the executors on the books of the new firm; they were subsequently credited with interest accruing, charged with goods and money paid, and statements of the account were rendered to them. M. testified that his intention, when he went into the firm, was "to take the affairs of the old firm as he found them, and go on with them as a member of the new firm." In 1884 the assignment was executed, B. joining therein, in which the debt to the estate was preferred. He made no defense to an action brought by the executors against him and the other members of the firm to recover the debt as a firm debt, and they obtained judgment therein. Plaintiffs' debts accrued subsequent to B.'s becoming a member of the firm. *Held*, that the stock and property of the old firm at the time B. became a member was subject to the equitable lien of the then existing creditors of the firm; that it was inferable from the circumstances that the new firm had assumed the debt to the estate, and, therefore, had a right to treat it as a debt of the firm, and so, it was properly preferred. *Id.*

PATENT (FOR INVENTION).

Plaintiff's complaint alleged in substance, among other things, that he was the owner of letters patent, securing to him the exclusive right to manufacture and sell a certain machine; that he granted to defendants the right to manufacture and sell the patented machine, the latter to pay a specified royalty; that defendants, for the fraudulent purpose of competing with and underselling the plaintiff, manufactured a machine resembling the plaintiff's, but of less value. The relief asked was an injunction, an annulment of the license, damages, etc. On the trial, plaintiff, abandoning the grounds set out in the complaint, proceeded as for a recovery of royalties for the machines sold. Defendants offered in evidence the letters patent; these were objected to and excluded. *Held*, error; that they were competent upon

the question as to whether defendants were manufacturing and selling the machine invented by plaintiff. *Brusie v. Peck Bros. & Co.* 623

PATENT (FOR LANDS).

1. A patent for state lands under navigable waters, granted by the commissioners of the land office, which is not void on its face and so requires evidence *dehors* the instrument to show its invalidity, may only be assailed in a direct proceeding to review the action of the commissioners, or by an action in equity to set aside the patent. *N. Y. C., etc., v. Aldridge.* 83
2. The fact that the owner of land bounded by a navigable river has conveyed to a railroad company for the use of its road a strip of the land along the water front, over which its route runs, does not deprive him of the character of riparian owner, within the meaning of the statute in reference to grants of lands under water, nor does it give to the company that character; although the title granted to the company is a fee, it holds and can only use the land for the purposes of its road. *Id.*
3. The H. R. R. Co. pursuant to the act of 1846 (Chap. 216, Laws of 1846, duly designated the line of its road, as it passed through the town of Fishkill, and filed the proper certificate thereof in the office of the county clerk; it obtained from owners of lands fronting on the river conveyances of a strip of land along the river over which the route ran, the eastern boundary of which was above high-water mark, thus taking in the river front. The deeds contained reservations of the grantors' rights to all land lying below high-water mark, except such portion as was included in the route as laid out and located. The grantors subsequently conveyed their remaining lands "excepting and reserving" the line of the railroad as then in use and occupation by the company. In 1867 the grantees made application to the commissioners of the land office for a grant of land under the river

adjacent to the upland, which was opposed by the company; while the application was pending the company, assuming to act under the amendment of 1848, changed the westerly line of the road, as originally laid out over said lands, by carrying said line further west, in no other respect changing the original location. In 1869 the commissioners granted the said application and issued a patent to the applicants "subject to all rights and privileges in and to said premises," which said company had acquired under its charter. In 1873 said commissioners issued a patent to plaintiff, it having succeeded to the rights of the H. R. R. Co. in the strip of land under water included in the new westerly line. In an action of ejectment to recover said strip, *held*, that plaintiff acquired no title thereto either by the alleged alterations, or by said patent; that even if the patents so issued to the defendants were void because they were not the upland proprietors, this could not be urged in this action, as plaintiff could only succeed by showing title in itself. *Id.*

4. Also *held*, that the patents so issued to defendants were valid; that neither the provision in said patents making the grants subject to the rights and privileges acquired by plaintiff, nor the provision of the Revised Statutes in reference to grants of land under water (1 R. S. 208, § 67) as amended in 1850 (Chap. 283, Laws of 1850), prohibiting the commissioners from making any grant interfering with the rights of said H. R. R. Co. affected their right to a patent, or the validity of those granted to them; also, that conceding the company had power to alter its course in the manner it assumed to do, this alteration did not affect the rights of the commissioners to make a grant to an upland proprietor of land included in the alteration. *Id.*

PARTY WALLS.

1. P. and A. who were owners of adjacent lots, made an agreement in writing providing that either

party, his heirs or assigns, might erect a party wall, one half on each lot, the other party, his heirs or assigns to have the right to use the same by paying to the party erecting said wall at the time the same shall be used, one-half the value thereof, and the same shall forever remain as a party wall. It was stated in the agreement that it shall be construed "as covenants running with the land." The agreement was signed and acknowledged by A. only, and was recorded. P.'s grantee built upon his lot a house with a party wall, and plaintiffs subsequently acquired title to the premises through various conveyances, each of which was made subject to the party-wall agreement. S. became owner of A.'s lot and commenced to build thereon, making use of the party wall; while building S. conveyed to defendants, making no reference to said agreement. In an action to restrain defendants from using said wall until payment to plaintiffs of one-half the value thereof and for such further relief as might seem proper, the judgment directed payment to plaintiffs of the value of one-half the wall; charged the defendants' premises with such payment, and directed that unless made they be sold to satisfy the judgment. *Held*, no error; that while the relief demanded was an injunction, with all the facts before it, it was proper for the court to administer further equitable relief and give to the agreement such legal effect as would accomplish exact justice between the parties; that whether the agreement was to be considered a common law obligation personally enforceable, or an instrument which impressed a lien upon the land, when it was availed of it was enforceable against the land. *Mott v. Oppenheimer.* 812

2. Also *held*, the objection that the agreement appeared to have been executed by one of the parties and, so, was invalid as lacking mutuality, was not tenable, as the proofs showed that the contract had been made and defendants, standing upon A.'s title, were not entitled to make the objection. *Id.*

3. Also *held*, the objection that because the conveyance to defendants from S. contained no reference to the agreement they were not bound, was untenable, as the agreement was a charge upon the land, and if defendants did not have actual, they had constructive notice from the public records and so were bound. *Id.*

4. Also *held*, that the agreement was, by reason of the expressed intention of the parties, a covenant running with the land, and its effect was to grant or to create an interest in the premises. *Id.*

PENAL CODE.

§ 421. { *Vanderwater v. N. Y. &*
 { *N. E. R. R. Co.* 583

PIERS.

See WHARVES.

PLEADING.

1. A plaintiff having a cause of action which entitles him to an injunction restraining the unlawful maintenance and operation of a railroad in a street in front of his premises, by reason of its continuous interference with his rights of property, may unite with a demand for such equitable relief and for damages, because of such interference, a claim for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway. *Lamming v. Galusha.* 239

2. While the injuries are distinct in character, they both proceed in a general sense from the same wrong and are "transactions connected with the same subject of action," within the meaning of the Code of Civil Procedure (§ 484), authorizing the union of two or more of such causes of action in one complaint. *Id.*

3. An allegation of negligence on the part of the defendants in the

operation and management of a train, which the complaint alleges caused the special injury is not necessary, as the unauthorized and continuous obstruction of the highway is a public nuisance and a person sustaining a special injury therefrom is entitled to recover his damages, irrespective of the question of negligence at the time of the injury. *Id.*

4. An allegation contained in an answer which has no reference to and does not admit any allegation of the complaint, is not a conclusive admission, and the defendant is not estopped thereby from proving a fact inconsistent with the allegation. *Ferrie v. Hard.* 354

PORT CHESTER (VILLAGE OF).

Plaintiff had contracted to sell property upon which an assessment was imposed by defendant for a local improvement. The receiver of taxes published a notice and demanded payment, notifying plaintiff that the property would be sold unless the assessment was paid. Upon return to the warrant that the assessment was unpaid, defendant's board of trustees passed a resolution directing its treasurer to advertise and sell. Plaintiff then asked to be allowed to deposit with the vendee sufficient to cover the amount of such assessment, until a determination of the proceedings taken to test its legality. Said trustees refused this request or to make any arrangement to delay the sale. Plaintiff then paid the assessment at the same time serving notice that she paid under protest and reserved her right to sue for and recover the same. In an action brought to vacate said assessment and to recover the amount paid the illegality of the assessment was conceded. *Held*, that such payment was involuntary it having been made under circumstances amounting to coercion at law; and that plaintiff having established the invalidity of the assessment, was entitled to recover back the money paid. *Vaughn v. Village of Port Chester.* 460

PRACTICE.

The party succeeding on trial of an action by the court or a referee should see to it that he has findings of fact sufficient to uphold his judgment, and if he does not he is exposed to the perils of a reversal by an appeal based solely upon exceptions to the legal conclusions. *Rochester L. Co. v. Stiles & P. P. Co.* 209

See APPEAL.
PLEADING
TRIAL.

PRESUMPTIONS.

1. The presumption is that a testator intends that his dispositions shall take effect in enjoyment or interest at the date of his death, and, upon the happening of that event, unless the language of the will by fair construction makes his gifts contingent they will be regarded as vested. *Nelson v. Russell.* 137
2. Where, upon appeal in an action tried by the court or a referee, no case is made containing the evidence, but the appeal is based solely upon exceptions contained in the judgment-roll, and the findings of fact do not sustain the conclusions of law, it may not be assumed that there was evidence justifying other findings which would sustain the conclusions; on the contrary, it is to be assumed that there was no such evidence, and when the conclusions of law have been properly excepted to, the judgment may not be sustained. *Rochester L. Co. v. Stiles & P. P. Co.* 209
3. An incoming partner is not as of course liable for the prior debts or transactions of the firm; he can be made liable only by an agreement on his part to assume such liability. His becoming a member of the firm creates no presumption of the existence of such an agreement. *Peyser v. Myers.* 599
4. Where the record on appeal in an action tried by a referee contained none of the evidence, but simply so far as proofs were concerned

the referee's findings of fact. *Held*, it was to be assumed that all the evidence upon which the findings were based was received without objection; and that the question as to the competency of the evidence under the pleadings was waived, and so, it could not be considered here. *Niebuhr v. Schreyer.* 614

— Where commissioners have jurisdiction to make an assessment and act upon due notice to party assessed, and he has an opportunity to review the assessment, the conclusive presumption in an independent action is that the assessment is fair.

See Garrett v. Trustees, etc. 436

PRINCIPAL AND AGENT.

A policy of fire insurance contained a condition that if the assured were not the sole owners of the property insured, or did not have title to the land on which it was situated in fee simple, and this fact was not expressed in the policy, it should be void. The assured held the land under a contract of purchase; this fact was not expressed in the policy, but had been communicated to a clerk of the general agent of the insurer who had been sent to make an examination of the premises preliminary to the risk. In an action upon the policy, *held*, that notice to the subagent while so engaged in soliciting the insurance was notice to the company, and bound it to the same extent as though it had been given directly to the agent himself; and so, that the policy was not avoided by the condition. *Carpenter v. Ger. Am. Ins. Co.* 298

PROMISE.

See CONTRACT.

QUESTIONS OF LAW AND FACT.

— When question as to due diligence in action against guarantor one of law.

See S. S. Nat. Bank v. Sloan. 371
C. Nat. Bank v. Pratt. 423

—When question as to negligence of officers of savings bank in paying deposit to one not entitled to receive it. is one of fact.

See *Gearns v. B. Sav. Bank.* 557

RAILROAD CORPORATIONS.

1. Neither the provision of the act of 1846 (Chap. 216, Laws of 1846) incorporating the H. R. R. Co. for the purpose of constructing a railroad along the east side of the Hudson river, nor the amendatory act of 1848 (Chap. 30, Laws of 1848) gave the corporation any title to lands belonging to the state, whether above or under the waters of the river; nor did the adopting a course or filing a map as prescribed give any such title. Said acts, at most, gave only an implied license to the company to build along the course selected; the title to lands of the state as well as those of individuals to be subsequently acquired. *N. Y. C., etc., v. Aldridge.* 88

2. The provision of said amendatory act (§ 5) giving to the directors of the company power to adopt a new and altered location for its road as a substitute for the original location, applies only to what is in reality an alteration and substitution; not to that which is a mere addition to the original location. *Id.*

3. The H. R. R. Co. pursuant to said act of 1846, duly designated the line of its road, as it passed through the town of Fishkill, and filed the proper certificate thereof in the office of the county clerk; it obtained from owners of lands fronting on the river conveyances of a strip of land along the river over which the route ran, the eastern boundary of which was above high-water mark, thus taking in the river front. The deeds contained reservations of the grantors' rights to all land lying below high-water mark, except such portions as was included in the route as laid out and located. The grantors subsequently conveyed their remaining lands "excepting and reserving" the line of the railroad as then in use and occupation by the company. In

1867 the grantees made application to the commissioners of the land office for a grant of land under the river adjacent to the upland, which was opposed by the company; while the application was pending the company, assuming to act under the amendment of 1848, changed the westerly line of the road, as originally laid out over said lands, by carrying said line further west, in no other respect changing the original location. In 1869 the commissioners granted the said application and issued a patent to the applicants "subject to all rights and privileges in and to said premises," which said company had acquired under its charter. In 1873 said commissioners issued a patent to plaintiff, it having succeeded to the rights of the H. R. R. Co. in the strip of land under water included in the new westerly line. In an action of ejectment to recover said strip, *held*, that plaintiff acquired no title thereto either by the alleged alterations, or by said patent; that even if the patents so issued to the defendants were void because they were not the upland proprietors, this could not be urged in this action, as plaintiff could only succeed by showing title in itself. *Id.*

4. Also, *held*, that the patents so issued to defendants were valid, that neither the provision in said patents making the grants subject to the rights and privileges acquired by plaintiff, nor the provision of the Revised Statutes in reference to grants of land under water (1 R. S. 208, § 67) as amended in 1850 (Chap. 283, Laws of 1850), prohibiting the commissioners from making any grant interfering with the rights of said H. R. R. Co. affected their right to a patent, or the validity of those granted to them; also that conceding the company had power to alter its course in the manner it assumed to do, this alteration did not effect the rights of the commissioners to make a grant to an upland proprietor of land included in the alteration. *Id.*

5. A plaintiff having a cause of action which entitles him to an

- injunction restraining the unlawful maintenance and operation of a railroad in a street in front of his premises, by reason of its continuous interference with his rights of property, may unite with a demand for such equitable relief and for damages, because of such interference, a claim for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway. *Lamming v. Galusha*. 289
6. An allegation of negligence on the part of the defendants in the operation and management of a train, which the complaint alleges caused the special injury is not necessary, as the unauthorized and continuous obstruction of the highway is a public nuisance, and a person sustaining a special injury therefrom is entitled to recover his damages, irrespective of the question of negligence at the time of the injury. *Id.*
7. Under and by the act of 1862 (Chap. 233, Laws of 1862), authorizing the W. T. Co. to construct a street railroad, and operate the same by any mechanical or other power, except steam, the company was authorized, upon obtaining the consent of the proper municipal authorities, to adopt electricity as a motive power. *Hudson River Telephone Co. v. Waterliet Turnpike & R. Co.* 398
8. Said act may not be limited to the methods of operating such railroads known and in actual use at the time of its passage, nor is the company irrevocably bound by the choice of motive power first made after the passage of the act. *Id.*
9. So also, under the power given by that act to the common council of the city of Albany to impose such restrictions as, in its judgment the interests of the public require, that body is not bound by the limitations first imposed, but the authority is coincident with the company's right of selection. *Id.*
10. Accordingly *held*, that said company having obtained the consent of the common council of the city of Albany, was authorized to adopt and use what is known as the single-trolley system of electrical propulsion, it appearing and having been found that it is the best system thus far devised, and is not prejudicial to public health, or dangerous. *Id.*
11. Also *held*, that said company was not subject to the provision of the Street Surface Railroad Act (§ 12, chap. 252, Laws of 1884, as amended by chap. 531, Laws of 1889), requiring the approval of the railroad commissioners and the consent of the owners of one-half the property upon the streets, as it came within the saving clause in said act (§ 18), which declares that the act shall not interfere with, repeal or invalidate any rights theretofore acquired. *Id.*
12. Inchoate as well as perfected rights are saved by such a clause. *Id.*
13. The primary and dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. *Id.*
14. The fact that inconvenience or loss results to one, having no easement in a street, from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of the street, does not, in the absence of a statute imposing a liability, give a right of action. *Id.*
15. In an action brought by plaintiff, a corporation organized under the act providing for the incorporation of telegraph companies (Chap. 265, Laws of 1848), to restrain defendant from operating its road by the single-trolley system upon certain streets in the city of Albany, *held*, that as plaintiff had accepted its franchise, which authorizes it to construct and operate its lines upon streets and highways upon the express

condition that they shall not be so constructed as to incommode the public use, and as defendant was occupying the streets in such a manner as to expedite public travel and promote the public use to which they were devoted, plaintiff's franchise was of a subordinate character and it could not complain that the system adopted by defendant interfered with the operation of its lines; that it was part of plaintiff's compact with the state that the maintenance of its lines shall not prevent the adoption of any safe, convenient and expeditious mode of travel, such as defendant's system was shown to be. *Id.*

16. Also *held*, the fact that plaintiff's system of communication was only partially established in the public streets, its telephones being located and its wires grounded upon private property, and that defendant's method permitted the electric current used to propel its cars to escape and flow to plaintiff's grounded wires, thus inflicting serious loss, did not give a right of action, as the use of its grounded wires was a part of its system of telephonic communication through the streets which it maintains under the permission of the state and subject to the condition that it shall not incommode the use of the streets by the public; that its franchise was indivisible and entirely subservient to the lawful uses of the streets for public travel; that having accorded to the public an unrestricted right of passage, it could not question the form in which that right is enjoyed so long as it is lawful and is utilized with proper care and skill.

Id.

17. In the absence of a statute imposing upon a railroad company the duty of ringing bells or blowing whistles upon locomotives approaching a crossing, the failure to give such signals is not, as matter of law, negligence. *Vandewater v. N. Y. & N. E. R. R. Co.* 583

18. The provision of the General Railroad Act (§ 89, chap. 140, Laws of 1850; § 7, chap. 282, Laws

of 1854), imposing that duty, having been repealed by the act of 1886 (Chap. 593, Laws of 1886); the only statute upon the subject remaining is the provision of the Penal Code (§ 421), which provides that the engineer of a locomotive who fails to ring the bell or sound the whistle upon it, eighty yards from a crossing, shall be guilty of a misdemeanor; this imposes no duty upon the company. (MAYNARD, J., dissenting as to last proposition.) *Id.*

19. *It seems*, however, a railroad company owes a duty to the public to run its trains with care and caution at crossings, and the failure to give due warning of an approaching train by the signals specified, or in some other way, may properly be considered as bearing upon the question of negligence. *Id.*

20. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, who, while crossing defendant's tracks at a farm crossing, was struck and killed by a locomotive moving at a very high rate of speed, plaintiff gave evidence tending to show that no bell was rung or whistle blown for a highway crossing two thousand feet from the farm crossing, or when the engine passed a depot sixteen hundred feet therefrom, and that it was the custom of enginemen or firemen to give either one or other of these signals at both those places. The court charged that it was the duty of defendant to blow the whistle or sound the bell eighty rods before reaching the highway and continue it at intervals until the crossing was passed, and that if it did not do this and the accident at the farm crossing was occasioned by that omission, the jury might find a verdict of negligence, the same as if said provisions of the Railroad Act had not been repealed. *Held*, error. *Id.*

21. Where a committee of railroad mortgage bondholders appointed on foreclosure sale of the mortgaged property, for the purpose of effecting a reorganization, enter into a contract within the scope of

the authority given to them, an action to have the contract adjudged null and void is not sustainable, in the absence of any claim of fraud on the part of those contracting with the committee or participation on their part in some fraud of the committee; it is not sufficient to aver conduct on the part of the latter which might, as between them and the bondholders, amount to a violation of their trust duties. *Brooks v. Dick.* 652

RECORDING ACT.

One who acquires title to valuable property for a merely nominal money consideration, although actually paid, but under circumstances indicating a gift or advancement, is not within the meaning of the Recording Act (1 R. S. 766, § 1) "a purchaser for a valuable consideration," and his deed, although recorded, conveys no title as against a prior unrecorded conveyance of the same property. The consideration must not only be good, but valuable, in the sense that a fair equivalent is given for the property granted, in order to constitute the grantee a purchaser for value. *Ten Eyck v. Witbeck.* 40

—When subsequent grantee chargeable with notice of a recorded agreement, granting an interest in the premises.

See Mott v. Oppenheimer. 312

REFERENCE.

1. A stipulation of the parties on trial before a referee, that the referee may charge such fees for his services as he deems proper, is invalid and may not be enforced, as it does not specifically fix a different rate of compensation from that prescribed by the Code of Civil Procedure (§ 3296), but leaves the amount thereof open and indefinite; and so does not change the statutory rate in the only manner authorized by the Code. *Griggs v. Day.* 469

2. A stipulation fixing a different rate from that prescribed made

verbally at the commencement of the trial, and afterwards reduced to writing, a sufficient compliance with the requirement that to change the rate there must be a consent of the parties "at or before the commencement of the trial." *Id.*

RELEASE.

1. Where a release is general in its terms and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol; the instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress or some like cause. *Kirchner v. New Home S. M. Co.* 182

2. So, also, if the words of a release fairly import a general discharge, their effects may not be limited so as to exclude a demand simply upon proof that at the time of its execution the releasor had no knowledge of the existence of the demand. *Id.*

3. *It seems*, however, when a general release is pleaded as an affirmative defense to a cause of action, plaintiff may show that by a mutual mistake of the parties, or a mistake on his part and fraud on the part of defendant, the cause of action was included in the release, contrary to the agreement and intent of the parties, or in case of fraud, contrary to his intent. *Id.*

4. *It seems*, also, that the intentional concealment by the releasee of a cause of action existing in favor of the releasor, of which he was ignorant, will be sufficient to estop the former from insisting upon any advantage to be derived from the mistake of the latter. *Id.*

5. In an action by plaintiff, who had been defendant's agent in the sale of sewing machines, to recover damages for a forcible eviction from his store and detention of the premises from him, and for injuries to his property in the store, defendant proved and gave in evidence a general release, under

seal, executed by plaintiff after the cause of action arose, absolving the defendant from all liability for any demand or cause of action which plaintiff might have against it, either upon contracts or in tort, and especially for all trespasses committed by it or damages for which it might be responsible to plaintiff. At the end of the release was a provision to the effect that it was understood between the parties that plaintiff should not interfere in any manner with any sales of sewing machines theretofore made by him for defendant, or with collections thereon. Plaintiff claimed that part of the consideration of his release was the restoration to him of his store and property and that he then had no knowledge that any of the property had been injured, destroyed or disposed of by defendant. There was evidence showing the existence of various controversies and litigations between the parties at the time the release was executed, and tending to show that it was not the intention to include in the release the cause of action sued upon. The court charged that the release would not be allowed to operate upon any right of action not covered by the particular clause and not mentioned in the preliminary discussions which led up to the release; also, that it did not cut off plaintiff's right to recover for any injury to him or his property not known to him at the time of its execution. *Held*, error. *Id.*

6. The distinction in the rule as to the availability of parol evidence to contradict or modify the instrument, applicable, to releases and that applied to receipts pointed out. *Id.*

REMAINDER.

The words "from and after" used in a testamentary gift of a remainder, following a life estate, do not afford sufficient ground in themselves for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context they are to be regarded as defining the time of enjoyment simply and

not of the vesting of title. *Nelson v. Russell.* 187

REMEDY.

A patent for state lands under navigable waters, granted by the commissioners of the land office, which is not void on its face and so requires evidence *de hors* the instrument to show its invalidity, may only be assailed in a direct proceeding to review the action of the commissioners, or by an action in equity to set aside the patent. *N. Y. C. & H. R. R. Co. v. Albridge.* 88

RESCISSION.

1. In an action to rescind a contract for the purchase of real estate and to recover \$200 purchase money paid, and \$208.51 expenses of search and disbursements, the complaint also alleged that plaintiff was by the terms of the contract to receive the rent of the premises from June 1st to 15th; and without alleging the amount thereof asked to recover the same. The judgment was for defendant. *Held*, that the amount involved was less than \$500, and so the judgment was not reviewable here; that as plaintiff sought to rescind the contract he could not at the same time claim the rent of the premises he would have been entitled to had he performed it. *Miele v. Deperino.* 618

2. Defendants did not plead a rescission of the contract with plaintiff, but were permitted to give in evidence a letter from plaintiff alleging a failure on the part of defendants to perform the contract, and stating that he considered that they "have forfeited their right under it," that he should no longer "consider himself bound by it," and that he would hold them responsible for any damage that may occur to him from their further manufacturing the patented machine; also evidence that soon after receipt of the letter defendants returned to plaintiff the patterns, and that they ceased manufacturing said

machines after receipt of the letter. The court charged the jury that they were not to consider the question of rescission, and refused to charge that if the parties mutually agreed to rescind, plaintiff could only recover royalties up to the date of rescission. *Held*, error. *Brusie v. Peck Bros. & Co.* 622

RIPARIAN OWNER.

1. A riparian owner who, by his willful act, diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages. *Hartshorn v. Chaddock.* 116

2. In an action to recover such damages, when the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than the diminution in the market value of the whole property by reason of the injury, the cost of restoration is the proper measure of damages, to which may be added the loss of the use of the property in consequence of the injury; but when the cost of restoring is more than such diminution, the latter is usually the true measure of damages. *Id.*

3. In such an action, evidence showing both the cost of restoring the land to its former condition and the diminution in its market value is admissible. *Id.*

4. When damages are to be assessed upon one or the other of these two methods, according to the circumstances, and plaintiff's proof is confined to one of them, and defendant fails to supply proof as to the other, or to raise any question on trial as to the failure of plaintiff to supply it, the omission may not be availed of on appeal. *Id.*

5. Where, in such an action, evidence was given by plaintiff showing the cost of restoring the land, and none was given by either party in regard to the effect of the injury upon the market value,

held, that the evidence was sufficient to sustain an award of damages. *Id.*

6. An exception or reservation, in a deed of uplands adjoining the Hudson river, of the water rights, privileges and grants appertaining to the land conveyed is wholly ineffectual where the grantor had, at the time of the conveyance, no grant from the state or title to the lands under water, and the grantor retains nothing which he can thereafter convey. *People ex rel. v. Comrs., etc.* 447

7. The fact that the grantor had previous to the conveyance, without any right, entered upon and filled up the land under water, gives him no title, and he did not thereby become a proprietor of "adjacent lands," within the meaning of the statutes controlling grants by said commissioners (1 R. S. 208, § 67); as between him and the state the land so filled in remains land under water. *Id.*

See PATENT FOR LANDS.

RIVERS.

See NAVIGATION.

SALES.

A written contract for the manufacture and sale of certain machines to be used in the manufacture of wood pulp, contained a guaranty on the part of the vendor that the machines would take care of all the pulp produced from "four Scott grinders." In an action to recover the contract price, defendant set up as a counterclaim a breach of this guaranty. It appeared that such grinders were constructed of different productive capacities, and that defendant had contracted for four of said machines. *Held*, that plaintiff was properly permitted to show that the guaranty was given upon the representation of defendant that the "Scott grinders" contracted for had the capacity to produce a certain amount of pulp; and that the machines furnished would care for

that quantity; that the receipt of the evidence was not in conflict with the rule excluding oral evidence to contradict or change a written instrument, as the evidence did not contradict, but simply explained the contract. *Bagley & S. Co. v. Saranac R. P. & P. Co.* 626

See JUDICIAL SALES.
VENDOR AND PURCHASER.

SAVINGS BANKS.

See BANKS AND BANKING.

SEAMEN.

1. The owners of a vessel are not liable in damages for the willful and malicious acts of its master in assaulting and injuring a seaman while upon the high seas; such an act being of a criminal nature, is not in violation of any duty imposed upon the owners by maritime law, and the doctrine of *respondet superior* has no application. (MAYNARD, FINCH and O'BRIEN, JJ., dissenting.) *Gabrielson v. Waydell.* 1
2. The master and seamen of a vessel are engaged in a common employment and are fellow-servants, although of different grades, and while the master in rendering to the seamen that care and in performing those duties imposed upon its owners by the maritime law represents them, and for a neglect of duty in these respects they are liable, in all matters outside the scope of the master's employment and without the authority committed to him by maritime law, his misconduct is a risk assumed by the seaman, for the consequences of which the owners are not responsible. *Id.*

SENATE DISTRICTS.

1. Under the provisions of the State Constitution (Art. 3, §§ 4, 5) providing for an enumeration of the inhabitants of the state in 1855, and at the end of "every ten years thereafter," and for an altera-

tion of the senate districts and apportionment of members of assembly at "the first session after the return of every enumeration," the power to make the alteration and apportionment is not limited to regular sessions; but when, after the adjournment of the regular session at which an enumeration bill is passed, and after an enumeration thereunder, an extraordinary session is called by the governor and he recommends this subject for consideration, such a session is the "first session" within the meaning of said provision, and the legislature so in session has power to make the changes and apportionment. *People ex rel. v. Rice.* 473

2. Where the first legislature, convened at the expiration of a ten years' period, fails to perform the duty imposed upon it of directing an enumeration, the power to direct it is not lost until the recurrence of another ten years' period but the duty devolves upon the next and each succeeding legislature until the constitutional mandate is obeyed. *Id.*
3. The amendments to the State Constitution made in 1874, which struck out the provision denying to a colored person the right to vote, who had not the prescribed property qualification, and relieving all those not so qualified from direct taxation (Art. 2, § 1), and which omitted from the provision in reference to the apportionment of members of assembly, the clause excluding from the enumeration "persons of color not taxed" (Art. 3, § 6), had the effect to abrogate and strike out the similar words in the provision relating to the reorganization of senate districts. (Art. 3, § 4). *Id.*
4. There is no presumption that any particular proportion of colored persons not taxed resides in any one senate district and unless the existence of an unequal proportion in the different districts is proved, it may not be held that any one has been injured by a failure to exclude such colored persons from the number of inhabitants upon

which senate districts are based; and as, the courts will not attempt to remedy errors that injure no one, in the absence of proof of such an unequal proportion, a court is not called upon to determine the question as to the constitutionality in this regard of an act reorganizing senate districts which does not exclude from the calculation "persons of color not taxed." *Id.*

5. The constitutional provision (Art. 3, § 4) vesting in the legislature the power to alter the senate districts after each enumeration, and requiring this to be done so that "each senate district shall contain, as near as may be, an equal number of inhabitants," etc., grants to the legislature a discretion in carrying out the power, and the court has no jurisdiction to review the exercise of this discretion, unless it appears that it has been plainly and grossly abused (ANDREWS and FINCH, JJ., dissenting). *Id.*
6. Accordingly *held*, (ANDREWS and FINCH, JJ., dissenting), that the Apportionment Act of 1892 (Chap. 397, Laws of 1892) was not violative of any constitutional provision and so was valid. *Id.*

SET-OFF.

1. Where no right of set-off exists when an assignment by an insolvent debtor for the benefit of creditors is made, it cannot arise afterwards in favor of one indebted to the insolvent estate who is also a creditor. *Fera v. Wickham*. 223
2. Where therefore, among the assets transferred by such an assignment, was a demand against one who at the time the assignment was made held a demand against the assignor which had not then matured, *held*, that he was not entitled to a set-off; and this, although his claim against the estate matured before that against him. *Id.*

SHIPPING.

The owners of a vessel are not liable in damages for the willful and

malicious acts of its master in assaulting and injuring a seaman while upon the high seas; such an act being of a criminal nature, is not in violation of any duty imposed upon the owners by maritime law, and the doctrine of *respondet superior* has no application. (MAYNARD, FINCH and O'BRIEN, JJ., dissenting.) *Gabrielson v. Waydell*. 1

See CHARTER PARTY.

SLANDER.

1. In an action for slander plaintiff is entitled to prove, as bearing upon the question of malice, other slanderous statements than those set forth in the complaint, made by defendant, imputing the same charge as that embodied in the words set forth. *Enos v. Enos*. 609
2. It is not necessary that such other statements shall be in the same words or substantially the same as those set forth; it is sufficient if they are a repetition of the same calumny. *Id.*
3. *It seems*, however, that words so proved as repetitions of the slander charged are only admissible or available as bearing upon the degree of malice of defendant in speaking the words charged in the complaint; they do not furnish an independent cause of action, and no recovery can be based solely thereon. *Id.*
4. Where an action for slander was based upon words charging a married woman with unchastity, *held*, that, it was competent for plaintiff, as bearing upon the question of damages, to prove that she had a family of young children. *Id.*

SPECIFIC PERFORMANCE.

1. Upon submission of a controversy wherein a vendee sought to be relieved from the performance of a contract for the purchase of real estate the following facts appeared: B. who died seized of the

premises, by his will, devised them to his two daughters for life, and "from and after" their decease to two grandchildren named and their heirs, the heirs of a deceased grandchild to take the share "that parent would have taken if living." One of the daughters died prior to the execution of the contract which was made by the other daughter, and the two grandchildren who executed a deed to plaintiff in accordance with the contract which he refused to accept. *Held*, that the grandchildren having survived the testator, took upon his death a vested remainder in fee in the premises; that the provision for their issue was by way of substitution in case of the death of the parent during the life of the testator; and that therefore, the vendor's deed conveyed a good title. *Nelson v. Russell*. 187

2. In an action for the specific performance of a contract for the purchase of real estate, the question is simply whether the legal title to the land is, notwithstanding the objections made thereto, good in the vendor, and will pass by his conveyance to the purchaser. *Holly v. Hirsch*. 590

3. The distinction between such a case and one where a purchase at a judicial sale is sought to be enforced, pointed out. *Id.*

4. *It seems*, however, that when the title depends upon questions of fact and resort must be had to parol evidence, a purchaser will not be compelled to perform his contract. *Id.*

5. By his will B. gave all his property to his executors in trust, to receive the rents, etc., to sell, convey or otherwise dispose of it as they might deem best, and finally "to apply the said estate, * * * together with the proceeds of any part or portions sold," as thereafter provided. The testator then gave to each of his said executors two-sevenths of his estate in fee, and the remaining three-sevenths they were to hold upon trust for certain beneficiaries named. B. had contracted to sell a portion of his

real estate to P. Before the time fixed for the delivery of the deed B. died. His executors executed a deed to P. and received from him the purchase money unpaid. P. subsequently conveyed to D., who conveyed to plaintiff's testator. In an action for a specific performance of a contract by defendant to purchase said premises, he objected to the title on the ground that the executors had no power to convey in performance of their testator's contract, and so their deed vested no title in P. *Held*, untenable; that while the executors did not take any legal estate under the preliminary devise in trust of all the testator's property; the trust being an active one and enforceable as a power in trust, included every disposable interest, and gave to the executors power to convey a perfect legal title to the real estate in question, irrespective of the fact that the testator had by his contract to sell the same changed in equity the character of his estate therein. *Id.*

STATE.

1. To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state and through it by the municipality which governs and controls the port. *In re Mayor, etc.* 253
2. The only standard by which to judge of the extent of the duty is the necessities of the business. *Id.*
3. Where a permanent pier and an exclusive right to its use is a necessity of large steamship lines, without which business cannot properly be transacted, the duty rests upon the state or the municipality to provide such accommodations, or to permit the companies to obtain them from private owners. *Id.*

See BOARD OF CLAIMS.

STATUTES.

— Chap. 359, *Laws of 1870*.
See *Bolton v. Schriever*, 65.

— § 5, tit. 1, chap. 180, *Laws of*
1842.
— § 2, chap. 240, *Laws of* 1847.
See People ex rel. v. Donovan, 76.
— Chap. 216, *Laws of* 1846.
— Chap. 80, *Laws of* 1848.
— 1 R. S. 208, § 67.
— Chap. 288, *Laws of* 1850.
See N. Y. C. & H. R. R. Co. v.
Aldridge, 88.
— Chap. 205, *Laws of* 1888.
— Chap. 60, *Laws of* 1884.
— Chap. 541, *Laws of* 1888.
See Parmenter v. State, 154. *
— 1 R. S. 728, §§ 51, 52.
See Brown v. Chubb, 174.
— Chap. 200, *Laws of* 1848.
— Chap. 875, *Laws of* 1849.
— Chap. 172, *Laws of* 1862.
See Quilty v. Battie, 201.
— 1 R. S. 888, § 4, subd. 71.
— § 7, chap. 761, *Laws of* 1866.
— Chap. 861, *Laws of* 1867.
— § 56, chap. 371, *Laws of* 1875.
— Chap. 402, *Laws of* 1882.
— § 812, chap. 409, *Laws of* 1882.
See People ex rel. v. Coleman, 281.
— Chap. 269, *Laws of* 1880.
— § 5, tit. 4, chap. 535, *Laws of*
1888.
See In re Corwin, 245.
— Chap. 137, *Laws of* 1870.
— Chap. 574, *Laws of* 1871.
— § 715, chap. 410, *Laws of* 1882.
See In re Mayor, etc., 253.
— Chap. 175, *Laws of* 1883.
See In re Globe Mut. Ben. Assn., 280.
— Chap. 400, *Laws of* 1883.
— Chap. 249, *Laws of* 1890.
See People ex rel. v. Lorillard, 285.
— Chap. 355, *Laws of* 1853.
See Barrett v. Palmer, 386.
— 1 R. S. 502, § 3.
See Hughes v. Bingham, 347.
— § 7, tit. 3, chap. 519, *Laws of*
1870.
— § 8, chap. 479, *Laws of* 1886.
— Chap. 572, *Laws of* 1886.
See Curry v. City of Buffalo, 366.
— Chap. 233, *Laws of* 1862.
— Chap. 265, *Laws of* 1848.
— § 12, chap. 252, *Laws of* 1884.
— Chap. 531, *Laws of* 1889.
See Hudson Riv. Tel. Co. v. Water-
chiet T. & R. Co., 393.
— 1 R. S. 208, § 67.
See People ex rel. v. Comrs. of Land
Office, 447.
— §§ 879, 903, chap. 410, *Laws of*
1882.
See People ex rel. v. Myers, 465.
— Chap. 397, *Laws of* 1892.
See People ex rel. v. Rice, 473.

— § 35, chap. 263, *Laws of* 1890.
— Chap. 296, *Laws of* 1891.
— Chap. 341, *Laws of* 1876.
— Chap. 321, *Laws of* 1877.
See McDougall v. Pro. Sav. Life As-
surance Soc., 551.
— § 39, chap. 140, *Laws of* 1850.
— § 7, chap. 282, *Laws of* 1854.
— Chap. 593, *Laws of* 1886.
See Vandewater v. N. Y. & N. E. R.
R. Co., 588.
— Chap. 392, *Laws of* 1888.
See People ex rel. v. Barker, 656.

See LIMITATION OF ACTIONS.
RECORDING ACT.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STIPULATION.

1. A stipulation of the parties on trial before a referee, that the referee may charge such fees for his services as he deems proper, is invalid and may not be enforced, as it does not specifically fix a different rate of compensation from that prescribed by the Code of Civil Procedure (§ 3296), but leaves the amount thereof open and indefinite; and so, does not change the statutory rate in the only manner authorized by the Code. *Griggs v. Day*. 469
2. A stipulation fixing a different rate from that prescribed made verbally at the commencement of the trial, and afterwards reduced to writing, a sufficient compliance with the requirement that to change the rate there must be a consent of the parties "at or before the commencement of the trial." *Id.*
3. In pursuance of a stipulation which recited that an undertaking given on appeal to this court had been canceled, an order was entered which gave plaintiff leave to file another "undertaking to perfect the appeal" within five days, and provided that the new undertaking should have when filed the same force and effect as if it had been filed and served when the first undertaking was

given, and that if not filed as specified, the appeal should be dismissed. A new undertaking not having been filed, the appeal was dismissed. Another appeal was thereafter taken and perfected. On motion to strike the case from the calendar, *held*, that the case was placed by the stipulation and order on the same footing as if no undertaking had been given, and the appellant had the right, within the statutory time for appealing, to take and perfect another appeal. Motion, therefore, denied. *Culliford v. Gadd*. 632

STREETS.

See HIGHWAYS.

SURROGATE'S COURT.

1. A surrogate before admitting to probate the will of one who was at his death an inhabitant of the state, and died seized of property therein, and issuing letters testamentary thereon, has power and is bound to inquire and to decide as to whether the testator was an inhabitant of the county at the time of his death, and if that officer decides that he was, upon evidence legally tending to support his decision, this decision may not in the absence of fraud or collusion be questioned collaterally. *Bolton v. Schriever*. 65
2. Where, therefore, prior to the passage of the acts providing in substance that the jurisdiction of a surrogate, in the cases specified, when the necessary parties were duly cited or appeared shall not in the absence of fraud be questioned collaterally (Chap. 359, Laws of 1870; Code Civ. Pro. § 2473), a resident of the state died seized of real estate in the county of New York, and upon petition of the executor named in his will, which alleged that the decedent was at or immediately preceding his death an inhabitant of the county, the will was by decree of the surrogate thereof admitted to probate and letters testamentary issued thereon, after a hearing and judicial investigation, at which hear-

ing the heirs at law who were infants appeared by guardian, *held*, that the decree was in effect a decision, that the decedent was, at the time of his death, an inhabitant of said county; and that this could not be questioned in an action of ejectment brought by the heirs. *Id*.

3. *It seems* that if no contest had been made, and no evidence given on the subject of inhabitancy except the sworn allegation in the petition the surrogate could have relied upon the fact so stated, and his decision would be regarded as conclusive, subject only to attack by a direct proceeding to review it. *Id*.
4. Under the provision of the Code of Civil Procedure (§ 2576), providing for appeals from surrogate's decrees, an appellant desiring a review upon the facts is not required to so specifically state in his notice of appeal. The grounds of the appeal are not required to be stated, and a notice that the appeal is "from the decree, and each and every part thereof," is sufficient to authorize such a review. *In re Stewart*. 413
5. Said section was intended to declare affirmatively the power of the General Term to review both the facts and the law on appeals from surrogates' decrees, not to regulate the practice in bringing such appeals, except to require that, when the appeal is from a decree rendered on trial of an issue of fact, a case must be made and settled, as on appeal in an action. *Id*.
6. The rule that in an action tried by a jury, a motion for a new trial is necessary to review the facts, is not applicable to a trial before a surrogate. *Id*.
7. Under the Code of Civil Procedure (§ 2538), a Surrogate's Court has power in its discretion, to grant an order directing the issuing of a commission to examine before trial a party to a proceeding pending before it. *In re Plumb*. 661

TAXATION.

See ASSESSMENT AND TAXATION.

TELEGRAPH COMPANIES.

1. In an action brought by plaintiff, a corporation organized under the act providing for the incorporation of telegraph companies (Chap. 265, Laws of 1848), to restrain defendant from operating its road by the single-trolley system upon certain streets in the city of Albany, *held*, that as plaintiff had accepted its franchise, which authorizes it to construct and operate its lines upon streets and highways upon the express condition that they shall not be so constructed as to incommode the public use, and as defendant was occupying the streets in such a manner as to expedite public travel and promote the public use to which they were devoted, plaintiff's franchise was of a subordinate character and it could not complain that the system adopted by defendant interfered with the operation of its lines; that it was part of plaintiff's compact with the state that the maintenance of its lines shall not prevent the adoption of any safe, convenient and expeditious mode of travel, such as defendant's system was shown to be. *Hudson River Telephone Co. v. Watervliet T. & R. Co.* 393

2. Also *held*, the fact that plaintiff's system of communication was only partially established in the public streets, its telephones being located and its wires grounded upon private property, and that defendant's method permitted the electric current used to propel its cars to escape and flow to plaintiffs grounded wires, thus inflicting serious loss, did not give a right of action, as the use of its grounded wires was a part of its system of telephonic communication through the streets which it maintains under the permission of the state and subject to the condition that it shall not incommode the use of the streets by the public; that its franchise was indivisible and entirely subservient to the lawful

uses of the streets for public travel; that having accorded to the public an unrestricted right of passage, it could not question the form in which that right is enjoyed so long as it is lawful and is utilized with proper care and skill. *Id.*

TELEPHONE COMPANIES.

See TELEGRAPH COMPANIES.

TITLE.

1. The fact that the owner of land bounded by a navigable river has conveyed to a railroad company for the use of its road a strip of the land along the water front, over which its route runs, does not deprive him of the character of the riparian owner, within the meaning of the statute in reference to grants of lands under water, nor does it give to the company that character, although the title granted to the company is a fee, it holds and can only use the land for the purposes of its road. *N. Y. C. & H. R. R. Co. v. Aldridge.* 83
2. Neither the provision of the act of 1846 (Chap. 216, Laws of 1846) incorporating the H. R. R. Co. for the purpose of constructing a railroad along the east side of the Hudson river, nor the amendatory act of 1848 (Chap. 80, Laws of 1848) gave the corporation any title to lands belonging to the estate, whether above or under the waters of the river, nor did the adopting a course or filing a map as prescribed give any such title. Said acts, at most, gave only an implied license to the company to build along the course selected; the title to lands of the state as well as those of individuals to be subsequently acquired. *Id.*
3. The title of the mortgagor of real estate is not changed by the mortgage, and although the mortgagee goes into possession by a surrender from the mortgagor, the fee still remains in the latter. *Sexton v. Breeze.* 387

TOWN.

1. A town, in its corporate capacity, has power to take lands for highway purposes, by conveyance voluntary or otherwise. *Hughes v. Bingham.* 847
2. The power to take by voluntary conveyance implies the power to take such interest as the necessity of the case, or the public good, may require, and so, where a use for only a portion of the year is required, the town may take a conveyance limited to such use. *Id.*
3. A town meeting has no power to discontinue a highway once established; that can be done only by the intervention of the authorities, and according to the procedure prescribed by statute. (1 R. S. 502, § 3.)

TRADE-MARKS.

1. One who has adopted a trade-mark to identify his production, and by his labor and skill has created a valuable market therefor, and has induced public confidence in the superior quality of his goods, whether based on the skill used in their manufacture, or in the material from which they are made, or on both combined, is entitled, so long as he deals openly and honestly with the public, to be protected against those who, without right, attempt to appropriate his symbol and apply it to other goods of the same class. *Prince Mfg. Co. v. Prince M. P. Co.* 24
2. The jurisdiction, however, of equity to restrain the infringement of a trade-mark is founded upon the right of property in the plaintiff and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public, and a party invoking its aid must himself be free from fraud. *Id.*
3. Any material misrepresentation, therefore, in a label or trade-mark, as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity, although the defendant's conduct is without justification. *Id.*
4. A party who has secured the confidence of the public in an article manufactured by him and identified by a trade-mark, on the ground that it is made from one material, of which the trade-mark is a guaranty, cannot, without advising the public, substitute another material, although as good as the former, and sell that upon the credit of the true article, and justify the false use of the trade-mark or label on the ground of similar quality. *Id.*
5. The owners of a tract of land, upon which was a mine of iron ore known as the "Prince Mine," began the manufacture from the ore obtained therefrom of a metallic paint, which was sold in packages with a label attached containing the words "Prince's Metallic Paint;" this was claimed as a trade-mark. Plaintiff, who claimed to have succeeded to the rights of the original proprietors, as well as its predecessors in the use of the label, represented and warranted the public in believing that the words meant paint made from the ore of said mine, and the credit the article had in the market was owing in part to the belief of the trade that said ore was, as claimed by the proprietors, superior to all other ore used in manufacturing paints. Plaintiff, having acquired title to other mines, applied the label indiscriminately to paint manufactured from their ores as well as to that of the original mine. In an action to restrain defendant from using said trade-mark, *held*, that when plaintiff offered for sale packages of paint with the label attached, it was an implied representation that the paint was the product of ore from the Prince mine, and this representation being untrue, it was not entitled to equitable relief; and this, although it appeared that the article so labeled was as good as that made from the ore of said mine. *Id.*

TRESPASS.

1. In an action to restrain defendant from interfering with the water of a certain spring, etc., the following facts appeared: In 1852 defendant granted to C., under whom plaintiff claims, and who owned an adjoining farm, for the use of said farm, "all the water of said spring which can be conducted through one-half inch lead pipe," to be laid by C. All the water of said spring came through a crevice or opening in a rock fifteen inches below the surface. C. boxed the spring and laid pipe therefrom as stipulated, and thus conveyed the water to his farm. There was another spring upon defendant's farm about thirteen feet from the one in question, the water from which he conveyed to his house, and which furnished an abundant supply therefor. In 1884 and 1888 plaintiff, without the consent and against the protests of defendant, excavated the basin of his spring about twenty-three inches, tapping the vein which supplied defendant's spring, thus diverting the water therefrom. Defendant filled up the excavations so made, restoring the spring to its original condition. *Held*, that the grant to C. had reference simply to the spring as it then was; that it was not intended by it to make defendant's whole farm servient for the supply of water that would flow through a one-half inch pipe; that plaintiff had no right to dig lower than was necessary to take the water flowing from the crevice in the rock, and by so doing he became a trespasser, and defendant had the right to fill in the excavations thus made; and so, that the complaint was properly dismissed. *Turner v. Seabury.* 50
2. A trespass committed by the wife in the care and management of her separate estate is her independent personal tort for which the husband is not liable, and in an action to recover damages therefor he is not a proper party. *Qualty v. Battie.* 201
3. An action of trespass will not lie to recover the damages caused by an injunction, where the court had jurisdiction and power to grant such a writ, and where the one issued was not wholly void, but was erroneous because not restricted in its operation, and was set aside for that reason; unless the procurement thereof is alleged and proved to have been malicious and without probable cause. *Mark v. Hyatt.* 306
4. *It seems*, where a void injunction order is granted, the mere service thereof is not a trespass, and if the party sought to be restrained voluntarily obeys it, he cannot maintain an action of trespass to recover his damages. *Id.*
5. Defendant, E., brought an action against the firm of which plaintiff was a member for an accounting and for royalties due her under a contract on its part to manufacture, as her licensee, a patented article, and for a cancellation of the license because of nonperformance of the contract, and to enjoin the licensees from further manufacturing under the license. By the judgment an accounting and revocation of the license was ordered and an injunction granted which perpetually restrained the licensees from manufacturing the patented article. A copy of this judgment was served on the licensees May 1, 1883. They obeyed the injunction, but appealed from the judgment, and on June fifth obtained an order staying proceedings. The judgment was modified on appeal by striking out the portion awarding an injunction (17 J. & S. 375). In an action of trespass plaintiff sought to recover his damages because of ceasing to manufacture during the interval between the service of copy judgment and the obtaining of the stay. The complaint was dismissed. *Held*, no error; that no trespass was established. *Id.*
6. *It seems* that an action *quære clausum fregit* is local in its character, and the courts of this state have no jurisdiction where the trespass is upon lands in another state. *Barrett v. Palmer.* 336
7. In an action of trespass brought in the City Court of Brooklyn, it

appeared that the *locus in quo* was originally part of the Brooklyn navy yard, belonging to the United States, political jurisdiction over which, with certain reservations, was ceded by this state to the United States. (Chap. 355, Laws of 1853.) Congress has not legislated in reference to civil actions arising in the territory. The federal authorities leased part of the lands, including the *locus in quo*, or permitted the city to use it for a market. The city leased it, and plaintiff was in possession as subtenant. Defendant moved to dismiss the complaint on the ground that the trespass complained of was upon land belonging to the United States, and that the court had no jurisdiction. This motion was denied. *Held*, no error. *Id.*

TRIAL.

- 1 In an action to recover damages sustained by a riparian owner, by reason of diverting the waters of a stream and causing them to flow on plaintiff's land evidence showing both the cost of restoring the land to its former condition and the diminution in its market value is admissible. *Hartshorn v. Chadock*. 116
2. When damages are to be assessed upon one or the other of these two methods, according to the circumstances, and plaintiff's proof is confined to one of them, and defendant fails to supply proof as to the other, or to raise any question on trial as to the failure of plaintiff to supply it, the omission may not be availed of on appeal. *Id.*
3. Where, in such an action, evidence was given by plaintiff showing the cost of restoring the land, and none was given by either party in regard to the effect of the injury upon the market value, *held*, that the evidence was sufficient to sustain an award of damages. *Id.*
4. Where evidence, objected to generally, is not in its essential nature incompetent, all grounds of objection which might have been obviated if they had been specifically stated, but which were not so

stated, must be deemed to have been waived and may not be raised upon appeal. *People v. Murphy*. 450

5. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, who, while crossing defendant's tracks at a farm crossing, was struck and killed by a locomotive moving at a very high rate of speed, plaintiff gave evidence tending to show that no bell was rung or whistle blown for a highway crossing two thousand feet from the farm crossing, or when the engine passed a depot sixteen hundred feet therefrom, and that it was the custom of enginemen or firemen to give either one or other of these signals at both those places. The court charged that it was the duty of defendant to blow the whistle or sound the bell eighty rods before reaching the highway and continue it at intervals until the crossing was passed, and that if it did not do this and the accident at the farm crossing was occasioned by that omission, the jury might find a verdict of negligence, the same as if said provisions of the railroad act had not been repealed. *Held*, error. *Vandewater v. N. Y. & N. E. R. R. Co.* 583
6. A party desiring to claim that facts offered to be proved are not competent under the pleadings must in some way raise the objection on trial; if he fail to do this he will be deemed to have waived it and to have consented that the evidence should have its legal force and effect. *Niebuhr v. Schreyer*. 614
7. Plaintiff's complaint alleged in substance, among other things, that he was the owner of letters patent, securing to him the exclusive right to manufacture and sell a certain machine; that he granted to defendants the right to manufacture the patented machine, the latter to pay a special royalty; that defendants, for the fraudulent purpose of competing with and underselling the plaintiff, manufactured a machine resembling the plaintiff's, but of less value. The relief asked was an injunction, an an-

nulment of the license, damages, etc. On the trial, plaintiff abandoning the grounds set out in the complaint, proceeded as for a recovery of royalties on the machines sold. Defendants offered in evidence the letters patent; these were objected to and excluded. *Held*, error; that they were competent upon the question as to whether defendants were manufacturing and selling the machine invented by plaintiff. *Brusie v. Peck Bros. & Co.* 622

8. Defendants did not plead a rescission of the contract with plaintiff, but were permitted to give in evidence a letter from plaintiff alleging a failure on the part of defendants to perform the contract, and stating that he considered that they "have forfeited their right under it," that he should no longer "consider himself bound by it," and that he would hold them responsible for any damage that may occur to him from their further manufacturing the patented machine; also evidence that soon after receipt of the letter defendants returned to plaintiff the patterns, and that they ceased manufacturing said machines after the receipt of the letter. The court charged the jury that they were not to consider the question of rescission, and refused to charge that if the parties mutually agreed to rescind, plaintiff could only recover royalties up to the date of rescission. *Held*, error. *Id.*

See CRIMINAL TRIAL.

TROY (CITY OF).

An excavation was made in a street of the city of Troy for the purpose of laying pipe to conduct water from the main laid in the street to a private residence. The owner thereof employed a firm of plumbers to do the work of conducting the water to his house. The city water works are the property of the municipality, and under the management and control of a board of water commissioners, who appoint a superintendent of the water works. Said firm applied to that officer for men

to dig the trench; he directed men in the employ of the city to do this, they were paid by the city, the firm refunding to the city the amount so paid. The excavation was left without proper guards and lights, and a horse belonging to L., plaintiff's assignor, while being driven along the street at night fell into the opening and was injured. In an action to recover damages it appeared that said board, pursuant to the power conferred upon them by statute (§ 6, chap. 58, Laws of 1855), enacted an ordinance or by-law, prohibiting any one, except the superintendent or person employed by him or the board, from tapping or making any connection with the mains, unless by the permission or under the direction of the superintendent; also that it had been the custom for years before the accident to make application to the superintendent for men to make excavations necessary in connecting with the mains, and that they were furnished as in this case. *Held*, that the by-law did not simply prohibit the connection of lateral pipes with the main by private persons, but also prohibited them from digging the necessary trenches in the streets; and that while, as between the owner of the dwelling and the plumbers, the digging was a part of the work of the latter, as to others it could not be held as matter of law that the men who dug the trench and left it unguarded ceased, for the time being, to be servants of the city, and became the servants of the plumbers; but that the question was one of fact and was properly submitted to the jury; and this having been found against the city that it was properly held liable, although it was not charged with notice, actual or implied, of the negligent act. *Wilson v. City of Troy.* 96

TRUSTS AND TRUSTEES.

1. Plaintiff commenced an action against her husband P. and others, claiming in substance that the other defendants gave to P. a bond secured by mortgage for \$50,000, of which sum \$10,000

belonged to her, it having been delivered to P. upon his agreement that he would hold the mortgage in trust for her for that sum. The relief asked for was that it might be adjudged that plaintiff was the owner of said securities to the extent of \$10,000 and interest from their date, and that her rights as such owner be enforced. P. died pending the action and his executors were substituted as defendants. The referee found that \$5,000 of plaintiff's money was included in the mortgage, and to that extent P. took and held it as her agent and trustee, and she was entitled to the benefit of the securities for that sum with interest. Plaintiff thereupon commenced this action alleging that the mortgagors had paid all of the interest and \$17,000 of the principal, but that no part thereof had been received and kept for plaintiff. She asked for an accounting and that compound interest be allowed to her. Judgment was subsequently entered in the first action. The defendants made a motion entitling the papers in both actions for leave to pay into court the amount of said judgment with interest for the benefit of plaintiff, which motion was opposed on the ground that she was entitled to more than simple interest. The motion was granted, the order providing that upon such payment the judgment should be fully discharged and satisfied. The money was paid to the county treasurer as directed and, upon subsequent motion by plaintiff, that officer was directed to pay and did pay over the sum deposited to her and her attorney, who satisfied the judgment. Defendants pleaded in the second action said judgment, its payment and satisfaction as a bar. *Held*, that the matters set forth as a cause of action in the second action were embraced within the issue in the former one; and so, that the judgment was a bar. *Price v. Holman.* 124

2. It did not appear that P. used the moneys paid to him on the bond for his own purposes, or that he in any way made any profit

out of them. *Held*, that plaintiff was entitled only to simple interest; that as plaintiff claimed in the first action more than she was entitled to, P. and his executors were justified in disputing the claim; that he was not required to pay over to plaintiff her share of the interest or of the principal without demand, and so, in the absence of proof of demand there was no breach of trust which would authorize the compounding of interest as a penalty. *Id.*

3. Also, *held*, that in the absence of evidence of bad faith on their part, the fact that the executors appealed from the former judgment, and thus delayed its payment did not render them chargeable with interest on the interest received by them. *Id.*
4. A trustee is not chargeable with interest solely because he deposits the trust moneys with his own, or uses them in his business, there must be in addition a breach of trust, a neglect or refusal to invest the fund at the time, or in the manner the trust instrument or the law points out. *Id.*
5. In an action by plaintiffs, who were judgment creditors of T., to reach and appropriate to the payment of their judgment certain real estate purchased by T. and by him procured to be conveyed to C., his daughter, the court found that the conveyance was procured by T. in contemplation of insolvency and with intent to defraud creditors; and that he furnished the consideration paid for the property, but that the grantee was free from fraud in the transaction; that about two months after the transfer a judgment was recovered against T., an execution issued thereon and returned unsatisfied, and subsequently said judgment was transferred to C. for a valuable consideration. Plaintiffs' judgments were recovered about a year afterwards. A judgment was rendered directing the property to be transferred to a receiver, the proceeds to be applied in satisfaction of plaintiffs' judgment, in disregard of C.'s right as a judg-

ment creditor. *Held*, error; that while under the statute (1 R. S. 728, §§ 51, 52) the property in the hands of C. was charged with a trust in favor of T.'s creditors, she being a judgment creditor as well as the grantee was both trustee and *cestui que trust*; that plaintiffs by bringing their action acquired no superior rights or equities; that conceding the rule giving to the vigilant creditor the fruits of his vigilance by recognizing the priority of his lien was applicable, it was satisfied and such priority secured by the union in C. of both the title to the property and to the prior judgment, with all legal remedies for its collection exhausted; that she having title and possession was not required to bring an action which would be substantially against herself in order to preserve her claim as a judgment creditor. *Brown v. Chubb.* 174

6. By his will B. gave all his property to his executors, in trust, to receive the rents, etc., to sell, convey or otherwise dispose of it as they might deem best, and finally "to apply the said estate, * * * together with the proceeds of any part or portions sold," as thereafter provided. The testator then gave to each of his said executors two-sevenths of his estate in fee, and the remaining three-sevenths they were to hold upon trust for certain beneficiaries named. B. had contracted to sell a portion of his real estate to P. Before the time fixed for the delivery of the deed B. died. His executors executed a deed to P. and received from him the purchase money unpaid. P. subsequently conveyed to D., who conveyed to plaintiff's testator. In an action for a specific performance of a contract by defendant to purchase said premises, he objected to the title on the ground that the executors had no power to convey in performance of their testator's contract, and so their deed vested no title in P. *Held*, untenable; that while the executors did not take any legal estate under the preliminary devise in trust of all the testator's property; the trust being an active one and enforceable

as a power in trust, included every disposable interest, and gave to the executors power to convey a perfect legal title to the real estate in question, irrespective of the fact that the testator had by his contract to sell the same changed in equity the character of his estate therein. *Holly v. Hirsch.* 590

7. Where a committee of railroad mortgage bondholders appointed on foreclosure sale of the mortgaged property, for the purpose of effecting a reorganization, enter into a contract within the scope of the authority given to them, an action to have the contract adjudged null and void is not sustainable, in the absence of any claim of fraud on the part of those contracting with the committee or participation on their part in some fraud of the committee; it is not sufficient to aver conduct on the part of the latter which might as between them and the bondholders amount to a violation of their trust duties. *Brooks v. Dick.* 652
8. Where securities belonging to a trust fund were in the possession of three trustees, jointly in another state, two of the trustees being residents of that state, and the other of this state, *held*, that they were not taxable in this state under the act of 1883 (Chap. 392, Laws of 1883), declaring that "all debts and obligations for the payment of money due or owing to persons residing within this state, * * * wherever said securities shall be held, shall be deemed for the purposes of taxation personal property within this state, and shall be assessed as such to the owner or owners." *People ex rel. v. Barker.* 656
9. Also *held*, that the question was not affected by the fact that such securities were bonds secured by mortgages upon lands in this state. *Id.*

UNDERTAKING.

In pursuance of a stipulation which recited that an undertaking given on appeal to this court had been canceled, an order was entered

which gave plaintiff leave to file another "undertaking to perfect the appeal" within five days, and provided that the new undertaking should have when filed the same force and effect as if it had been filed and served when the first undertaking was given, and that if not filed as specified, the appeal should be dismissed. A new undertaking not having been filed, the appeal was dismissed. Another appeal was thereafter taken and perfected. On motion to strike the case from the calendar, *held*, that the case was placed by the stipulation and order on the same footing as if no undertaking had been given, and the appellant had the right, within the statutory time for appealing, to take and perfect another appeal. Motion, therefore, denied. *Culliford v. Gadd.* 632

UNITED STATES.

1. The power of the federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state and separate a part of its territory from its jurisdiction, and the jurisdiction and authority of the state over lands so acquired by the United States by the exercise of the power of eminent domain, remains unchanged, except so far as their use for the purposes which they were required necessarily removes them from the domain of state authority. *Barrett v. Palmer.* 336
2. The state may cede to the United States political jurisdiction over such lands, in which case congress may legislate in regard to them. *Id.*
3. In such case, however, until congress makes new regulations touching the administration of justice in civil actions arising in the territory, the municipal law of the state controls and remains unchanged. *Id.*
4. As to whether even where congress has exercised this power, the state courts would be powerless to redress private injuries committed on the territory *quære.* *Id.*

VENDOR AND PURCHASER.

1. In an action for the specific performance of a contract for the purchase of real estate, the question is simply whether the legal title to the land is, notwithstanding the objections made thereto, good in the vendor, and will pass by his conveyance to the purchaser. *Holly v. Hirsch.* 590
2. The distinction between such a case and one where a purchase at a judicial sale is sought to be enforced, pointed out. *Id.*
3. *It seems*, however, that when the title depends upon questions of fact and resort must be had to parol evidence, a purchaser will not be compelled to perform his contract. *Id.*

VESSELS.

See CHARTER PARTY.
SHIPPING.

WAIVER.

Where the record on appeal in an action tried by a referee contained none of the evidence, but simply so far as proofs were concerned the referee's findings of fact. *Held*, it was to be assumed that all the evidence upon which the findings were based was received without objection; and that the question as to the competency of the evidence under the pleadings was waived, and so, it could not be considered here. *Niebuhr v. Schreyer.* 614

— Where insistence of a fire insurance company on right to examine a party insured, after the service of proof of loss, is a waiver of any objection founded on delay in serving the proofs.

See *Carpenter v. G. A. Ins. Co.* 298

WATER COURSES.

1. In an action to restrain defendant from interfering with the water of a certain spring, etc., the following facts appeared: In 1852, defendant granted to C., under whom plain-

tiff claims, and who owned an adjoining farm, for the use of said farm "all the water of said spring which can be conducted through one-half inch lead pipe," to be laid by C. All the water of said spring came through a crevice or opening in a rock fifteen inches below the surface. C. boxed the spring and laid pipe therefrom as stipulated, and thus conveyed the water to his farm. There was another spring upon defendant's farm about thirteen feet from the one in question, the water from which he conveyed to his house, and which furnished an abundant supply therefor. In 1884 and 1888, plaintiff, without the consent and against the protests of defendant, excavated the basin of his spring about twenty-three inches tapping the vein which supplied defendant's spring thus diverting the water therefrom. Defendant filled up the excavations so made restoring the spring to its original condition. *Held*, that the grant to C. had reference simply to the spring as it then was; that it was not intended by it to make defendant's whole farm servient for a supply of water that would flow through a one-half inch pipe; that plaintiff had no right to dig lower than was necessary to take the water flowing from the crevice in the rock, and by so doing he became a trespasser, and defendant had the right to fill in the excavations thus made; and so, that the complaint was properly dismissed. *Furner v. Seabury.* 50

2. A riparian owner, who, by his willful act, diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbors, is liable for the resulting damages. *Hartshorn v. Chad-dock.* 116

8. In an action to recover such damages, when the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than the diminution in the market value of the whole property by reason of the injury, the cost of restoration is the proper measure of damages, to which may be

added the loss of the use of the property in consequence of the injury; but when the cost of restoring is more than such diminution, the latter is usually the true measure of damages. *Id.*

4. In such an action, evidence showing both the cost of restoring the land to its former condition and the diminution in its market value is admissible. *Id.*

5. When damages are to be assessed upon one or the other of these two methods, according to the circumstances, and plaintiff's proof is confined to one of them, and defendant fails to supply proof as to the other, or to raise any question on trial as to the failure of plaintiff to supply it, the omission may not be availed of on appeal. *Id.*

6. Where, in such an action, evidence was given by plaintiff showing the cost of restoring the land, and none was given by either party in regard to the effect of the injury upon the market value, *held*, that the evidence was sufficient to sustain an award of damages. *Id.*

See NAVIGATION.

WHARVES.

1. To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state and through it by the municipality which governs and controls the port. *In re Mayor, etc.* 253

2. The only standard by which to judge of the extent of the duty is the necessities of the business. *Id.*

3. Where a permanent pier and an exclusive right to its use is a necessity of large steamship lines, without which business cannot properly be transacted, the duty rests upon the state or the municipality to provide such accommodations

or to permit the companies to obtain them from private owners.

Id.

4. Where this duty has been imposed by the state upon a municipality and it has undertaken its performance, all appropriate acts done by it in such performance are for a public purpose. *Id.*

5. Lands therefore required by a municipality, upon which such a duty has been imposed, for the construction of piers and wharves are required for a public use and may be taken under the right of eminent domain, although some portion may thereafter in the discretion of the municipality be divided off and placed in the exclusive possession of a lessee, to be used solely in the transaction of necessary business connected with the transportation of passengers and freight. *Id.*

6. Accordingly, *held*, that the provision of the New York Consolidation Act (§ 715, chap. 410, Laws of 1883) authorizing the department of docks to acquire for the benefit of the city title, by proceedings *in invitum*, to any and all wharf property in the city not owned by it included in the plans adopted in pursuance of the provisions of the act of 1870 (Chap. 187 Laws of 1870), as amended by the act of 1871 (Chap. 574, Laws of 1871) is not rendered unconstitutional by the fact that the city is authorized in its discretion to lease its piers or to give the exclusive use of some of them for special kinds of commerce (§ 716).

Id.

7. Also, *held*, that a sufficient grant of power was given by said provision to include in condemnation proceedings property of the nature described, used by a railroad or gas company for landing freight or other property. *Id.*

8. It is not necessary in such proceedings to show that the land proposed to be taken is required for the purpose of building any particular pier, dock or bulkhead; if required in order to enable the

city to carry out its general plan, the statute permits its acquisition.

Id.

WILLS.

1. A surrogate before admitting to probate the will of one who was at his death an inhabitant of the state, and died seized of property therein, and issuing letters testamentary thereon, has power and is bound to inquire and to decide as to whether the testator was an inhabitant of the county at the time of his death, and if that officer decides that he was, upon evidence legally tending to support his decision, this decision may not in the absence of fraud or collusion be questioned collaterally. *Botton v. Schriever.* 65

2. The words "from and after" used in a testamentary gift of a remainder, following a life estate, do not afford a sufficient ground in themselves for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context they are to be regarded as defining the time of enjoyment simply and not of the vesting of title. *Nelson v. Russell.* 187

3. The presumption is that a testator intends that his dispositions shall take effect in enjoyment or interest at the date of his death, and, upon the happening of that event, unless the language of the will by fair construction makes his gifts contingent they will be regarded as vested. *Id.*

4. Words of survivorship and gifts over on the death of the primary beneficiary are to be construed, unless a contrary intention appears, as relating to the death of the testator. *Id.*

5. Upon submission of a controversy wherein a vendee sought to be relieved from the performance of a contract for the purchase of real estate, the following facts appeared: B., who died seized of the premises, by his will, devised them to his two daughters for life, and "from and after" their decease to two

grandchildren named and their heirs, the heirs of a deceased grandchild to take the share "that parent would have taken if living." One of the daughters died prior to the execution of the contract which was made by the other daughter, and the two grandchildren who executed a deed to plaintiff in accordance with the contract, which he refused to accept. *Held*, that the grandchildren having survived the testator, took upon his death a vested remainder in fee in the premises; that the provision for their issue was by way of substitution in case of the death of the parent during the life of the testator; and that, therefore, the vendor's deed conveyed a good title.

Id.

6. Where the will of S. directed his executor to invest \$20,000 in a manner specified and pay over the income to his son for life, and at his death the principal to another, and it appeared that the corpus of the estate was so invested at the time of the testator's death as to produce income, *held*, that the son was entitled to the income from the death of the testator although not to its payment until a year from the granting of letters testamentary; that although the executor had a year in which to make the investment directed, as the gift of the income was wholly independent of the gift of the principal, the right to the former did not depend upon the investment, and whatever income arose from the principal until the investment was made, as directed, belonged to the legatee to whom it was expressly given. *In re Stanfield*. 292

7. The will of B. directed his trustees to invest an amount of money sufficient to realize an income of \$3,000 annually, and to pay such income to plaintiff during her life. By a codicil, after reciting his marriage to plaintiff since the making of the will, and that he had since "said marriage advanced to her large sums of money" for the declared "object and purpose to secure her such further sum as may be necessary for her support," he revoked the clause giving the annuity, and

then provided as follows: "I further provide and give, devise and bequeath to my said wife, and direct my said trustees shall pay to her the sum of ten thousand dollars, and the same shall be in lieu of dower in my said estate." In an action for the construction of the codicil, *held*, that it simply gave to plaintiff the sum specified, not an annuity of that amount; and that, as there was no ambiguity in the provision, it was not competent to receive evidence to explain it. *Bradhurst v. Field*. 564

8. By his will B. gave all his property to his executors, in trust, to receive the rents, etc., to sell, convey or otherwise dispose of it as they might deem best, and finally "to apply the said estate, * * * together with the proceeds of any part or portions sold," as thereafter provided. The testator then gave to each of his said executors two-sevenths of his estate in fee, and the remaining three-sevenths they were to hold upon trust for certain beneficiaries named. B. had contracted to sell a portion of his real estate to P. Before the time fixed for the delivery of the deed B. died. His executors executed a deed to P. and received from him the purchase money unpaid. P. subsequently conveyed to D., who conveyed to plaintiff's testator. In an action for a specific performance of a contract by defendant to purchase said premises, he objected to the title on the ground that the executors had no power to convey in performance of their testator's contract, and so their deed vested no title in P. *Held*, untenable; that while the executors did not take any legal estate under the preliminary devise in trust of all the testator's property; the trust being an active one and enforceable as a power in trust, included every disposable interest, and gave to the executors power to convey a perfect legal title to the real estate in question, irrespective of the fact that the testator had by his contract to sell the same changed in equity the character of his estate therein. *Holly v. Hirsch*. 590

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